1234 NO. 3380 1234

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

---

EUGENE SOL LOUIE,

*Plaintiff in Error,*

*vs.*

UNITED STATES OF AMERICA,

*Defendant in Error.*

---

# Transcript of the Record

---

*Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.*



CAPITAL NEWS PUBLISHING CO., BOISE

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

---

EUGENE SOL LOUIE,

*Plaintiff in Error,*

*vs.*

UNITED STATES OF AMERICA,

*Defendant in Error.*

---

# Transcript of the Record

---

*Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.*

## NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

---

R. E. McFARLAND,
W. B. McFARLAND,
Coeur d'Alene, Idaho.
*Attorneys for Plaintiff in Error.*

J. L. McCLEAR,
*U. S. District Attorney.*
J. R. SMEAD,
*Assistant District Attorney.*
Boise, Idaho, Attorneys for Defendant in Error.

# INDEX

*In the District Court of the United States Within and for the District of Idaho, Northern Division.*

---

MAY TERM, 1919.

UNITED STATES OF AMERICA,

*vs.*

EUGENE SOL LOUIE,

*Defendant.*

---

No. 1534.

---

INDICTMENT.

Charge Murder. Violation Section 273, Penal Code.

The Grand Jurors of the United States of America, being first duly impaneled and sworn, within and for the District of Idaho, Northern Division, in the name and by the authority of the United States of America, upon their oaths do find and present:

That heretofore, to-wit: On or about the 24th day of May, A. D. 1919, in the County of Benewah in the Northern Division of the District of Idaho, and in and upon Indian country, to-wit, within the limits of a certain Indian Reservation, to-wit, the Coeur d'Alene Indian Reservation in said Division and District, and

in the State of Idaho, Eugene Sol Louie, who was then and there a Coeur d'Alene Indian theretofore declared competent by the duly qualified authorities of the Department of Indian Affairs, and who then and there was a member of the Coeur d'Alene tribe of Indians by reason of the fact that he then and there had in common with all other members of said tribe an interest in certain tribal funds thereafter to be disbursed to the members of said tribe, including the said Eugene Sol Louie, by the United States of America, then and there unlawfully, wilfully, feloniously and of his deliberately premeditated malice aforethought made an assault upon one Adaline Bohn Sol Louie, a human being, with a knife, hammer and other deadly weapons to the Grand Jurors unknown, and did then and there unlawfully, wilfully and feloniously and of his deliberately premeditated malice aforethought strike, cut, bruise, beat and maim, the said Adaline Bohn Sol Louie, inflicting on the said Adeline Bohn Sol Louie in, about and upon her head, mortal wounds, of which the said Adeline Bohn Sol Louie then and there died, she, the said Adeline Bohn Sol Louie, being then and there a member of the Coeur d'Alene tribe of Indians and a ward of the United States living in and upon the aforesaid Coeur d'Alene Indian Reservation, and in the charge of the Superintendent of said Reservation;

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that the said

Eugene Sol Louie in the manner and form aforesaid did unlawfully, wilfully and feloniously, and of his deliberately premeditated malice aforethought, kill and murder the said Adeline Bohn Sol Louie, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

J. R. SMEAD,
*Assistant United States Attorney for the District of Idaho.*

C. A. ANDERSON,
*Foreman of the United States Grand Jury.*

WITNESSES EXAMINED BEFORE THE GRAND JURY IN THE ABOVE CASE:

Pascal George, Mrs. Joe Seltice, Joe Seltice, Prentice Wolf, Dr. Eugene W. Hill.

(Endorsed)
No. 1534.

*In the District Court of the United States, District of Idaho, Northern Division.*

UNITED STATES OF AMERICA,
*vs.*
EUGENE SOL LOUIE,
*Defendant.*

Indictment, Murder.
A True Bill.
C. A. ANDERSON,
*Foreman.*

Presented by the Foreman in open court and filed in the presence of the Grand Jury this 29th day of May, 1919.

W. D. McREYNOLDS,
*Clerk.*

---

At the May, 1919, term of the District Court of the United States for the District of Idaho, Northern Division, held at Coeur d'Alene, among others, the following proceedings were had on the days shown herein.

Present:—

Hon. Frank S. Dietrich, Judge.

Thursday, May 29th, 1919.

---

(Title of Cause.)

ARRAIGNMENT AND PLEA

Comes now the District Attorney with the defendant and Messrs. McFarland & McFarland, his counsel, into court, the defendant to be arraigned upon the indictment charging him with the crime of murder. The indictment was read to the defendant by the Clerk, who furnished him with a true copy thereof, upon order of the Court. The Court asked the defendant if the name by which he was indicted was his true name, and the defendant replied in the affirmative.

The defendant waived time in which to plead, whereupon, the Court asked the defendant if he

pleads guilty or not guilty of the offense charged in the indictment, and the defendant pleaded not guilty. The Court set the cause for trial at ten o'clock A. M. Wednesday, June 4th, 1919, and remanded him to the custody of the Marshal, to appear at that time.

---

Thursday, June 5th, 1919.

(Title of Cause.)

MOTION FOR DISMISSAL.

This cause came regularly on for trial before the Court and a jury, the defendant being present with his counsel, Messrs. McFarland & McFarland and R. B. Norris, Esq., the United States being represented by J. L. McClear, District Attorney and J. R. Smead, Esq., his assistant.

* * * * * * * * * *

The indictment was read to the jury by the District Attorney, who informed them of the defendant's plea of not guilty, heretofore entered thereto. Morton D. Colgrove was sworn and examined as a witness on the part of the United States. Counsel for the defendant here stated that he desired to make a motion without the presence of the jury; whereupon, the Court admonished the jury, then excused them, and they retired from the room. Counsel for the defendant then moved the Court to dismiss the cause, for want of jurisdiction. The said motion was argued by counsel, and taken under advisement by the Court.

* * * * * * * * * *

Whereupon, the Court after admonishing the jury, excused them until 9:30 o'clock A. M. June 6th, 1919, continuing further trial herein until that time.

---

Friday, June 6th, 1919.

(Title of Cause.)

ORDER DENYING MOTION TO DISMISS.

The trial of this cause was resumed before the Court and jury, counsel for the United States, the defendant and his counsel being present, it was agreed that the jurors were all present.

* * * * * * * * * *

The Court at this time announced his decision upon the defendant's motion to dismiss, denying the same; to which order the defendant excepted.

* * * * * * * * * *

Whereupon, the Court, after admonishing the jury, excused them until 9:30 o'clock A. M. June 7th, 1919, continuing further trial herein until that time.

---

(Title of Court and Cause.)

VERDICT.

We, the jury in the above entitled cause, find the defendant Eugene Sol Louie guilty of murder (as charged) in the second degree.

EDWIN E. KYLE,

*Foreman.*

Endorsed: Filed June 7, 1919.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

MOTION IN ARREST OF JUDGMENT.

And now after verdict against the said defendant and before sentence, comes the said defendant in his own proper person, and by McFarland & McFarland, his attorneys, and moves the Court here to arrest judgment herein and not pronounce the same for the following reasons, to-wit:

1. Because this Honorable Court has not jurisdiction of the person of said defendant, because the indictment shows upon the face thereof that prior to the commission of the crime charged, the defendant was not a ward of the government, had been emancipated and adjudged and declared competent by the duly qualified authorities of the Department of Indian Affairs of the government of the United States of America to conduct and transact his own affairs and business and protect himself and property, and because the evidence clearly shows that the assault committed and the injuries inflicted upon the said Adeline Bohn Sol Louie, the deceased, and of which she died, were committed and inflicted upon her at and upon the West One-half (W½) of the Southeast quarter (SE¼), and the East One-half (E½) of the Southwest quarter (SW¼) of Section Eleven (11), Township Forty-four (44) North of Range Five (5) West, and that at said time said lands and the whole thereof had been patented by the government of the United States to the said defendant, and the said defendant then and there held title in fee thereto.

2. That this Honorable Court has not jurisdiction of the crime charged against said defendant or the subject matter thereof, because the indictment shows upon the face thereof that prior to the commission of the crime charged, the defendant was not a ward of the government, had been emancipated and adjudged and declared competent by the duly qualified authorities of the Department of Indian Affairs of the government of the United States of America, to conduct and transact his own affairs and business and protect himself and property, and because the evidence clearly shows that the assault committed and the injuries inflicted upon the said Adeline Bohn Sol Louie, the deceased, and of which she died, were committed and inflicted upon her at and upon the West One-half (W½) of the Southeast quarter (SE¼), and the East One-half (E½) of the Southwest quarter (SW¼) of Section Eleven (11), Township Forty-four (44) North of Range Five (5) West, and that at said time said lands and the whole thereof had been patented by the government of the United States to the said defendant, and the said defendant then and there held title in fee thereto, because of which said errors in the record herein, no lawful judgment can be rendered by the Court upon the record in this cause.

McFARLAND & McFARLAND,
*Attorneys for Defendant.*
P. O. Address: Coeur d'Alene, Idaho.

Service of the above and foregoing motion in arrest of judgment by receipt of a true copy thereof

at Coeur d'Alene, Idaho, this 12th day of June, 1919, is hereby admitted.

J. L. McCLEAR,
*U. S. District Attorney.*

Endorsed: Filed June 13, 1919.
W. D. McREYNOLDS, Clerk.

---

(Title of Court and Cause.)

JUDGMENT.

Now, on this 13th day of June, 1919, the United States District Attorney, with the defendant and his counsel, Messrs. McFarland & McFarland, came into Court; the defendant was duly informed by the Court of the nature of the indictment found against him for the crime of murder, committed on the 24th day of May, A. D. 1919, of his arraignment and plea of "Not guilty as charged in said indictment," of his trial and the verdict of the jury on the 29th day of May, A. D. 1919, "Guilty as charged in the indictment." The defendant was then asked by the Court if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the Court.

Now, therefore, the said defendant having been convicted of the crime of murder,

It is hereby considered and adjudged that the said defendant, Eugene Sol Louie, be imprisoned in the United States Penitentiary, at McNeil Island, Washington, for the term of Twelve (12) Years and

it is further ordered and adjudged that said defendant be and is hereby remanded to the custody of the United States Marshal for Idaho, to be by him delivered into said prison and to the proper officer or officers thereof.

---

(Title of Court and Cause.)

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the 5th day of June, A. D. 1919, being one of the days of the May term of said Court, this cause came on to be heard before His Honor, Judge Frank S. Dietrich, one of the judges of said court, and a jury therein duly sworn to try said cause, the defendant having theretofore been duly and regularly arraigned in person and pleaded not guilty to said indictment, J. L. McClear, United States Attorney, and J. R. Smead, Assistant United States Attorney, appearing for plaintiff, and R. E. McFarland and R. B. Norris, appearing as attorneys for defendant, and the United States to maintain the issues on its part, called as witnesses divers persons, who being duly sworn testified in said cause.

BE IT FURTHER REMEMBERED, that upon the trial of said cause, the United States called as as a witness, one M. D. Colgrove, who being duly sworn testified as follows:

My name is M. D. Colgrove. I live at the Agency on the Coeur d'Alene Indian Reservation. Sorrento, Idaho, is our post office. It is a mile and a half

from the Agency. I am superintendent of that reservation, and have been superintendent nine years the 5th of November. I know the defendant, Eugene Sol Louie. He is an Indian of the Coeur d'Alene tribe.

BE IT FURTHER REMEMBERED, that the following interrogatories were propounded to said witness, to which he made the following answers:

Q. What is his present status with relation to that tribe, as to whether or not he is still a ward of the Government, that is, whether he has been declared competent to manage his own affairs, or whether he is a ward of the Government yet?

A. He has been given a patent in fee, which is supposed to be obtained through being competent.

Q. Referring to that patent in fee that you mentioned, you mean he has been given a patent in fee to certain land that was on the reservation there?

A. Yes, sir.

Q. On the Coeur d'Alene Indian Reservation?

A. Yes, sir.

Q. Prior to obtaining that patent in fee, was he interested in that land, and if so, in what way?

A. He had a trust patent for it prior to that.

Q. By that you mean the United States held that land in trust for him?

A. Yes, sir.

Q. Now has the defendant at the present time any interest in any funds later to be disbursed to the Coeur d'Alene tribe or to the individual mem-

bers of that tribe, rather, by the United States through your office?

A. Yes.

Q. He still has an interest in such funds?

A. Yes, sir.

Q. Were you acquainted with the woman mentioned in this indictment as having been killed, Adeline Sol Louie, Adeline Bohn Sol Louie?

A. Yes, sir.

Q. What was her status prior to her death? Was she a ward of the Government or not?

A. Yes, sir, she was a ward.

Q. By that you mean she had never been declared competent and had never received any patent in fee for any allotment?

A. Yes, sir, that is what I mean.

Q. And she remained in that status up to the time of her death?

A. Yes, sir.

BE IT FURTHER REMEMBERED, that said witness continued to testify upon examination by the United States Attorney, as follows:

Eugene Sol Louie has no lineal descendants, or any children. He has a father and mother living on the reservation. They are Coeur d'Alene Indians and wards of the Government in my charge. The land to which Eugene Sol Louie received the patent lies within the Coeur d'Alene reservation. That is, the limits prior to the time the last cession was made. These facts existed on the first of May, 1919. He had gotten his patent before that time.

BE IT FURTHER REMEMBERED, that said witness continued to testify upon cross-examination by R. E. McFarland, as follows:

I know the description of the land patented by the Government to the defendant. It is the West Half of the Southeast quarter and the East Half of the Southwest quarter of Section 11, Township 44 North of Range 5 West. All of the land that was formerly the Coeur d'Alene Indian Reservation and not ceded was not allotted to the Indians. There are no Indians on that reservation to whom allotments have not been made by the Government, except those born since May 2, 1910. There are no tribal lands on that reservation at all. The status of the land is all of the land that had not been allotted was opened to settlement on May 2, 1910, and of that land that was open to settlement, there is about 18,000 acres that has not been settled upon. That is yet open. It all lies within the reservation as we get the maps from the Indian Department. The reservation is shown, its shape. Part of it is in blue for the allotments, and the rest of it in white, showing that it was land that was opened to settlement. I know of the death of Adeline Sol Louie. She was residing on the land that was patented to the defendant at the time of her death.

BE IT FURTHER REMEMBERED, that said witness continued to testify upon re-direct examination by Mr. Smead, as follows:

This 18,000 acres that has not been settled on, was included in the cession by the Coeur d'Alene

tribe back to the United States. They are interested in this way. They get the money it would sell for. The land itself is owned by the Government and platted and thrown open to entry by the white people. The Indian lands now consist of the individual allotments in severalty to the members of the tribe and certain townsites on the reservation.

BE IT FURTHER REMEMBERED, that the witness continued to testify upon examination by the court, as follows:

The townsites are owned by the Government and they are sold by the general land office and the money goes into a fund that is to be distributed pro rata among the Indians. The proceeds arising from the sale of this 18,000 acres is turned over to the Indians, and divided among them per capita. The Government holds the title to that land in fee simple now. By this cession of which I spoke, the Indians relinquished their rights to it and when the patents come to the purchasers, they are made direct to the purchaser from the United States. The price of the land is fixed by an appraising commission. Every forty acres is appraised at a certain price. There is a proviso, however, that if the land was not sold by a certain period, the land might be sold at any valuation it might bring. This 18,000 acres consisted of land on top of the mountain peaks, which no one considered desirable and it still remains unsold.

BE IT FURTHER REMEMBERED, that to the following questions propounded by the Court, the witness made the following answers:

Q. What supervision do you exercise over the defendant here, he having a patent to his land? Do you exercise any control over him at all?

A. No, sir, the only thing I have to do is with his part of the money that is in the United States Treasury that is yet unpaid. We have had one distribution and he has received his share of that.

Q. That is a part of this common fund you mean that arises from the sale of this land?

A. Yes, sir.

Q. As to this particular allotment, he lives on that and does as he pleases?

A. Yes, sir, he was living on that and was making arrangements to farm a portion of it.

Q. And if he wanted to rent it, he could rent it?

A. Yes, sir.

Q. Or sell it?

A. Yes, sir. He could sell it.

BE IT FURTHER REMEMBERED, that said witness was dismissed from the witness stand, and thereupon United States Assistant Attorney, Mr. Smead, and R. E. McFarland and R. B. Norris, the attorneys for the defendant, stipulated in open court as follows:

That the injuries to Adeline Bohn Sol Louie and mentioned in the indictment, were sustained by her upon the land mentioned in the testimony of said witness Colgrove, viz., the West Half of the Southwest quarter and East Half of the Southwest quarter of Section 11, Township 44, North of Range West, which prior thereto had been patented in fee

to the defendant, and that after receiving such injuries, she was removed from said lands to the allotment of one Nancy Lawrence Moctelme, where she died.

BE IT FURTHER REMEMBERED, that thereupon the defendant, by his counsel, made the following objection and motion:

Upon the testimony of the witness Colgrove, and the stipulation made and entered into by the respective counsel in open court, and the further statement of the District Attorney that there would be no further or additional evidence offered with reference to the status of the defendant or the lands allotted to him and testified to be the witness Colgrove, the defendant objects to any further testimony in this case, and moves that the case be dismissed, for the reason that this court has no jurisdiction of the case, for the reason that the testimony clearly shows that the defendant is not an Indian under the control or superintendency of an Indian Agent or Superintendent; that he has been declared and adjudged by the Government and the proper authorities of the Government as competent to manage his own affairs, and that a patent to lands lying upon the so-called Coeur d'Alene Indian Reservation has been allotted to him, and that the injuries received by the deceased Adeline Bohn Sol Louie were received by her upon these lands so patented to the defendant, and that they are not within or properly speaking a part of the Coeur d'Alene Indian Reservation.

BE IT FURTHER REMEMBERED, that the court reserved his ruling upon said objection and motion, and took the same under advisement, pending the hearing of further testimony, and thereupon E. W. Hill was called by the United States as a witness, and after being duly sworn, testified as follows:

That he is in the employ of the Government at Desmet, Idaho, as medical officer for the Indian Service, Coeur d'Alene Indians, and that he had been in such service for about two and a half years; that he had been in the Government service for twelve years; that he was at Tensed, Idaho, on the 5th of May; that he received a telephone call from the Mission requesting him to go there to see a young woman that was seriously injured, and that he arrived there about a quarter of eight on May 5th. He found a girl practically unrecognizable from wounds; he recognized her as Adeline Sol Louie, the wife of Gene Sol Louie, the defendant. She was at the house of Nancy Lawrence, in a small room. That he is the official physician for the United States Government in the Indian Service, and was appointed by the Indian Bureau. He is paid a salary and for that compensation he serves the Indians without charge. It would be his duty to serve any Indian on the reservation without charge. The territory covering his employment is officially known and referred to as the Coeur d'Alene Indian Reservation.

BE IT FURTHER REMEMBERED, that said witness was excused and M. D. Colgrove was by the United States recalled and testified further upon examination by J. L. McClear, United States Attorney, as follows:

By a treaty stipulation with the Coeur d'Alenes, the United States agrees to provide a physician and blacksmith and a carpenter, and medicines for the Coeur d'Alenes and for that purpose, and embodied in the Indian bill, there is appropriated annually the sum of $3000.00. The duties of the physician under that is, to take care of all of the Indians. The physician cares for all the Indians, and the blacksmith does the work, and the carpenter does the work of the Indians on the reservation. However, by agreement, the carpenter has been changed to lease clerk, so that the money that formerly paid the carpenter's salary, now pays the lease clerk. This money is paid from an appropriation made by Congress known as the Coeur d'Alene Support. That takes care of all of the Indians in that way within the limits of the old reservation; all of the Indians on our census roll. The census roll includes both the allotted Indians and the Indians that have received patent, and all. That roll contains the names of all emancipated Indians.

BE IT FURTHER REMEMBERED, that said witness continued to testify upon examination by the Court, as follows:

The place where the deceased died is not on the defendant's allotment. It is in the townsite. Nancy Moctelme bought three lots and houses in the townsite of Tensed, and the girl had been removed there before I got out. The defendant's wife, who died, had not been emancipated in any formal way. Her land is still under trust. Her allotment is still under trust. This land in the townsite,—these lots, are not held in trust. They have been built on and sold. They have town lot sales, and these lots have been sold and patented and patents issued to purchasers, and she purchased. I don't know whether it was the first exchange, but she purchased from someone who purchased from the Government. She bought this property after the property had been sold and houses erected thereon. She bought the houses and lots.

BE IT FURTHER REMEMBERED, that said witness was excused from the witness stand, and other witnesses were called by the United States, sworn and testified, after which the Government rested.

BE IT FURTHER REMEMBERED, that no other or further testimony or proof was introduced, had, taken or given upon the trial of said cause, with reference to the status of the defendant, Eugene Sol Louie, or with reference to the status of the deceased, Adeline Bohn Sol Louie, at the time of the commission of the alleged crime, or at any other time, and that no other or further testimony

was produced, had, taken or given upon the trial of said cause with reference to the place where the said Adeline Bohn Sol Louie received the injuries from which she died.

BE IT FURTHER REMEMBERED, that at the conclusion of the Government's evidence and after the Government rested, the defendant, by his counsel, renewed the objection and motion above stated, and the Court overruled and denied said objection and motion, to which ruling the defendant, by his counsel, then and there duly excepted and an exception was duly allowed by the Court, and the defendant assigns such ruling as error.

And thereupon the defendant to maintain the issues on his part, called witnesses, who were duly sworn and testified. Here the defendant rested and the Government rested.

And thereupon the Court charged the jury, and said cause was argued to the jury by respective counsel.

And thereupon the jury rendered a verdict of guilty of murder in the second degree against said defendant.

BE IT FURTHER REMEMBERED, that upon the trial of said cause, the evidence upon behalf of the United States and the defendant both, clearly showed that at the time of the commission of the crime charged in the indictment herein, and of which defendant was convicted as aforesaid, and for some time prior thereto, the defendant had been

declared competent by the duly qualified authorities of the Department of Indian Affairs, to transact his own business and affairs, and that a patent had been issued to him by the United States for the West Half of the Southeast quarter, and the East Half of the Southwest quarter of Section Eleven, Township Forty-four North of Range Five West, in fee, and that the deceased, Adeline Bohn Sol Louie, was a Coeur d'Alene Indian, a ward of the Government, and was residing upon said lands with defendant and that she received the injuries from which she died, on said lands, and that after sustaining said injuries and before her death, she was removed to the home of Nancy Lawrence Moctelme, on patented lots in the townsite of Tensed, Idaho, where she died

BE IT FURTHER REMEMBERED, that after the rendition of the verdict of the jury aforesaid, and upon the defendant's being arraigned in open court for judgment and sentence, the defendant by his counsel, moved the Court to arrest judgment upon said verdict as follows:

And now after verdict against the said defendant and before sentence, comes the said defendant in his own proper person, and by McFarland & McFarland, his attorneys, and moves the Court here to arrest judgment herein and not pronounce the same for the following reasons, to-wit:

1. Because this Honorable Court has not jurisdiction of the person of said defendant, because the

indictment shows upon the face thereof that prior to the commission of the crime charged, the defendant was not a ward of the government, had been emancipated and adjudged and declared competent by the duly qualified authorities of the Department of Indian affairs of the government of the United States of America to conduct and transact his own affairs and business and protect himself and property, and because the evidence clearly shows that the assault committed and the injuries inflicted upon the said Adeline Bohn Sol Louie, the deceased, and of which she died, were committed and inflicted upon her at and upon the West One-half (W½) of the Southeast quarter (SE¼) and the East One-half (E½) of the Southwest quarter (SW¼) of Section Eleven (11), Township Forty-four (44) North of Range Five (5) West, and that at said time said lands and the whole thereof had been patented by the government of the United States to the said defendant, and the said defendant then and there held title in fee thereto.

2. That this Honorable Court has not jurisdiction of the crime charged against said defendant or the subject matter thereof, because the indictment shows upon the face thereof that prior to the commission of the crime charged, the defendant was not a ward of the government, had been emancipated and adjudged and declared competent by the duly qualified authorities of the Department of Indian Affairs of the government of the United States of America, to conduct and transact his own affairs

and business and protect himself and property, and because the evidence clearly shows that the assault committed and the injuries inflicted upon the said Adeline Bohn Sol Louie, the deceased, and of which she died, were committed and inflicted upon her at and upon the West One-half (W½) of the Southeast quarter (SE¼), and the East One-half (E½) of the Southwest quarter (SW¼) of Section Eleven (11), Township Forty-four (44) North of Range Five (5) West, and that at said time said lands and the whole thereof had been patented by the government of the United States to the said defendant, and the said defendant then and there held title in fee thereto, because of which said errors in the record herein, no lawful judgment can be rendered by the court upon the record in this cause. Which said motion was denied by the court, to which ruling of the court the defendant then and there duly excepted and assigns said ruling as error.

And thereupon the court rendered its judgment and sentence upon said verdict, which judgment and sentence is as follows:

That the defendant, Eugene Sol Louie, be imprisoned in the United States Prison at McNeil's Island, State of Washington, at hard labor for the period of twelve years.

And for as much as the evidence and proceedings and matters of exceptions above set forth, do not fully appear of record, the defendant, by his attorneys, tenders this bill of exceptions and prays that

the same be signed and sealed by the court here pursuant to the statute in such case made and provided;

Which is done accordingly this 9th day of July, A. D. 1919.

FRANK S. DIETRICH,
*Judge.*

---

## STIPULATION FOR SETTLEMENT OF BILL OF EXCEPTIONS.

It is hereby agreed and stipulated by and between the plaintiff and defendant in the above entitled action, that the above and foregoing bill of exceptions is a true and correct bill of exceptions in said case, and may be settled, signed and sealed by the court as such without any other or further notice to either of the parties hereto.

Dated this 8th day of July, A. D. 1919.

J. L. McCLEAR,
*United States District Attorney.*
R. E. McFARLAND,
*Attorney for Defendant.*

Service of the foregoing Bill of Exceptions, by receipt of a true copy thereof at Boise, Ada County, State of Idaho, this 5th day of July, A. D. 1919, is hereby admitted.

J. L. McCLEAR,
*United States District Attorney for the District of Idaho.*

Endorsed: Filed July 9, 1919.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

PETITION FOR WRIT OF ERROR.

And now comes Eugene Sol Louie, defendant herein, by McFarland & McFarland, and R. E. McFarland, his attorneys, and says that on the 13th day of June, A. D., 1919, this court entered judgment herein against this defendant on a verdict of the jury returned on the 7th day of June, A. D. 1919, upon an indictment charging the defendant with murder in violation of Section 273 of the Penal Code, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more fully appear from the assignment of errors, which is filed with this petition.

WHEREFORE this defendant prays that a writ of error may issue in this behalf out of the United State Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals aforesaid.

EUGENE SOL LOUIE.

By McFARLAND & McFARLAND,
and R. E. McFARLAND,
*Attorneys for Defendant.*

Service of the foregoing petition for Writ of Error by receipt of a true copy thereof at Boise, Idaho,

this 16th day of July, 1919, is hereby admitted.

J. L. McCLEAR,
*U. S. District Attorney,*
*Attorney for Plaintiff.*

Endorsed: Filed July 16, 1919.
W. D. McREYNOLDS, Clerk.

---

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Engene Sol Louie, defendant in the above entitled cause, by McFarland & McFarland and R. E. McFarland, his attorneys, in connection with his petition for a writ of error, makes the following assignments of error, which he alleges occurred upon the trial of said cause:

1. The indictment herein is insufficient and does not state facts sufficient to constitute or charge any crime against the laws of the United States of America, nor any offense under Section 273 of the Penal Code of the United States.

2. The indictment herein shows upon the face thereof that this court has not jurisdiction of the person of the defendant.

3. The indictment herein shows upon the face thereof, that this court has not jurisdiction of the subject of this cause or action.

4. The trial court erred during the progress of the trial, in over-ruling defendant's objection to the admission of any further testimony, after the conclusion of the testimony of Dr. E. W. Hill, for the

reason that the evidence disclosed the fact that the defendant was an emancipated Indian, had received his patent in fee, and that the injuries sustained by the deceased, and from which she died, was inflicted upon her upon the lands patented to the defendant by the United States, and this court has not jurisdiction of said cause.

5. The trial court erred in over-ruling and denying defendant's motion to dismiss this cause at the conclusion of the testimony of said witness Hill, for the reason that the evidence disclosed the fact that the defendant was an emancipated Indian, had received his patent in fee, and that the injuries sustained by the deceased, and from which she died, was inflicted upon her upon the lands patented to the defendant by the United States, and this court has not jurisdiction of said cause.

6. The trial court erred at the close of the testimony for the United States in over-ruling and denying defendant's motion to dismiss said cause, for the reason that the evidence clearly shows that at the time of the commission of the crime charged, the defendant had been declared by the Indian Department of the United States, competent to manage his own business and affairs, had been emancipated and there had issued to him a patent for the lands included in an allotment previously made by the United States to him, and that the crime charged was committed upon said lands, and not upon an Indian Reservation, and that the injuries

or wounds received by the deceased, and of which she died, was received upon said lands and premises, and not upon an Indian Reservation, and that the deceased died upon patented land, and not upon an Indian Reservation, and the court did not have jurisdiction over the person of the defendant, or the subjects of said action.

7. The trial court erred in denying the motion in arrest of judgment on behalf of defendant, in this, that the indictment shows upon the face thereof that this court has not jurisdiction of the defendant, for the reason that he has been declared or adjudicated competent to transact his own business and affairs.

That the testimony shows that the defendant, prior to the commission of the crime charged, was a Coeur d'Alene Indian, but had been declared and adjudicated competent to transact his own business, had been duly emancipated and had received from the United States a patent in fee to certain lands situated upon the Coeur d'Alene Indian Reservation, and that the injuries received by the deceased, and from which she died, were sustained upon said lands and premises, after the defendant had been so emancipated, and received said patent, and that the deceased died upon other patented lands and not upon the Coeur d'Alene Indian Reservation, and that the trial court, for the above

reasons, did not have jurisdiction of the subject of the action, or of the person of the defendant.

EUGENE SOL LOUIE,
*Defendant.*

By McFARLAND & McFARLAND,
*Attorneys for Defendant.*
and R. E. McFARLAND,

Service of the foregoing Assignment of Errors by receipt of a true and correct copy thereof, at Boise, Idaho, this 16th day of July, 1919, is hereby admitted.

J. L. McCLEAR,
*U. S. District Attorney,*
*Attorney for Plaintiff.*

Endorsed: Filed July 16, 1919.
W. D. McREYNOLDS, Clerk.

---

(Title of Court and Cause.)

## ORDER ALLOWING WRIT OF ERROR ON APPEAL.

On this 2nd day of August, A. D. 1919, comes Eugene Sol Louie, above named, by his attorneys, McFarland & McFarland and R. E. McFarland, and files herein and presents to the court, a petition for the allowance of a writ of error on appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit and assignment of errors intended to be urged by said defendant, Eugene Sol Louie, in said court, praying also that a transcript

of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such order and further proceedings may be had as may be proper in the premises.

In consideration whereof the court does now here allow the writ of error as prayed.

Done in open court this 2nd day of August, A. D. 1919, by the court.

FRANK S. DIETRICH,
*U. S. District Judge in and for the District of Idaho.*

Endorsed: Filed Aug. 2, 1919.
W. D. McREYNOLDS, Clerk.

---

(Title of Court and Cause.)

WRIT OF ERROR.

UNITED STATES OF AMERICA—ss.

The President of the United States to the Honorable Judges of the District Court of the United States for the District of Idaho, Northern Division, Greeting:

Because in the records and proceedings as also in the rendition of the judgment of a cause which is in the said District Court before you, or some of you, between the United States, plaintiff, and Eugene Sol Louie, defendant, manifest error has happened to the great damage of the said Eugene Sol Louie, defendant, as by his complaint appears, we being

willing that error, if any, should be duly corrected and full, speedy justice done to the party aforesaid in this behalf, do command if judgment be given therein, that then under your seal distinctly and openly you send the record and proceedings aforesaid with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit. together with this writ so that you may have the same at San Francisco, in said circuit, on the 1st day of September, A. D. 1919, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct the errors what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States this 2nd day of August, in the year of our Lord Nineteen hundred and nineteen, and of the Independence of the United States, One hundred and forty-two.

FRANK S. DIETRICH,
*U. S. District Judge, District of Idaho.*

Attest:

W. D. McREYNOLDS, (Seal)
*Clerk U. S. District Court,*
*District of Idaho.*

Endorsed: Filed Aug. 21, 1919.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

CITATION.

The President of the United States to the above named plaintiff, and to J. L. McClear, United States District Attorney, attorney for plaintiff:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, in said Circuit, on the 1st day of September A. D. 1919, pursuant to a writ or error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein Eugene Sol Louie is plaintiff in error, and you are attorney for the defendant in error, to show cause if any there be, why judgment in said writ of error mentioned, should not be corrected and speedy justice should not be done to parties in that behalf.

WITNESS the Honorable Frank S. Dietrich, Judge of the District Court of the United States, for the District of Idaho, this 2nd day of August, A. D. 1919, and of the Independence of the United States One Hundred Forty-two.

FRANK S. DIETRICH,
*District Judge.*

Attest:

W. D. McREYNOLDS, Clerk. (Seal)

---

ACCEPTANCE OF SERVICE OF CITATION.

I hereby, this 2nd day of August, A. D. 1919, accept due personal service of the foregoing Citation,

on behalf of the United States of America, defendant in error.

J. L. McCLEAR,
*United States District Attorney,*
*Attorney for the United States.*

Endorsed: Filed Aug. 2, 1919.
W. D. McREYNOLDS, Clerk.

---

(Title of Court and Cause.)

PRÆCIPE FOR RECORD.

To W. D. McReynolds, Clerk of the above entitled court:

You are hereby respectfully required to transmit to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, a printed transcript of the following papers constituting the record in this action on appeal, viz., indictment, plea of not guilty to indictment, verdict of the jury, defendant's bill of exceptions, motion in arrest of judgment, judgment, objection to introduction of further testimony, and motion to dismiss case, made during progress of trial, and all appeal papers, with the original Citation and Writ of Error.

McFARLAND &McFARLAND,
and R. E. McFARLAND,
*Atorneys for Defendant.*
P. O. Address: Coeur d'Alene, Idaho.

Endorsed: Filed July 21, 1919.
W. D. McREYNOLDS, Clerk.

RETURN TO WRIT OF ERROR.

And thereupon it is ordered by the court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit and the same is transmitted accordingly.

W. D. McREYNOLDS,

(Seal) *Clerk.*

---

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 40, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, as Requested by the praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $48.35, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said court this 9th day of August, 1918.

W. D. McREYNOLDS,

(Seal) *Clerk.*

3380

In The

# United States

# Circuit Court of Appeals

For the Ninth District

EUGENE SOL LOUIE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

# Brief of Plaintiff in Error

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.

R. E. McFARLAND, and
McFARLAND & McFARLAND,
Attorneys for Plaintiff in Error.
Coeur d'Alene, Idaho.

Press Publishing Company, Coeur d'Alene, Idaho

In The

# United States

# Circuit Court of Appeals

## For the Ninth District

---

EUGENE SOL LOUIE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

---

# Brief of Plaintiff in Error

---

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.

---

R. E. McFARLAND, and
McFARLAND & McFARLAND,
Attorneys for Plaintiff in Error.
Coeur d'Alene, Idaho.

In The

# United States

# Circuit Court of Appeals

For the Ninth District

---

EUGENE SOL LOUIE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

---

# Brief of Plaintiff in Error

---

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.

---

## STATEMENT OF THE CASE.

Plaintiff in error, was indicted at the May term, 1919, of the District Court of the United States for the District of Idaho, Northern Division, on the 29th day of May, A. D., 1919, for the crime of having on or about the 24th day of May, A. D., 1919, in the County of Benewah, in the Northern Division of the District of Idaho, in and upon Indian country, to-wit, within the limits of the Coeur d'Alene Indian Reservation, committed an assault upon one Adeline Bohn Sol Louie, thereby inflicting upon her mortal wounds, of which she died. In

other words, the plaintiff in error, is charged with the crime of murder. The indictment alleges that at the time of the commission of the crime charged, plaintiff in error was a Coeur d'Alene Indian, who had theretofore been declared competent by the duly qualified authorities of the Department of Indian Affairs, and a member of the Coeur d'Alene Tribe of Indians; that he then and there had in common with all other members of said tribe, an interest in certain tribal funds thereafter to be disbursed to the members of the tribe. (Record pages 7-8). To the indictment, plaintiff in error entered a plea of not guilty.

The cause was tried to a jury, who by their verdict found the defendant guilty of murder in the second degree. (P. 12). During the progress of the trial, M. D. Colgrove, testified as a witness on behalf of the United States, to the following facts: That he lives at the Agency on the Coeur d'Alene Indian Reservation, at Sorrento, Idaho; that he is superintendent of the Coeur d'Alene Indian Reservation; that he has been such superintendent for nine years; that he knows the plaintiff in error, Eugene Sol Louie; that he is an Indian of the Coeur d'Alene tribe. That said Eugene Sol Louie has been given a patent in fee, which is supposed to be obtained through being competent; that this patent in fee was to certain lands on the Coeur d'Alene Indian Reservation; that prior to receiving said patent, Eugene Sol Louie had a trust patent for the land; that the United States held the land in trust for him; that plaintiff in error has an interest in funds to be later disbursed to the Coeur d'Alene tribe of Indians, or to members of that tribe by the United States through the witness's office; that he was acquainted with Adeline Bohn Sol Louie, the woman mentioned in the in-

dictment as having been killed. That she was a ward of the government. She had never been declared competent and had never received any patent in fee for any allotment. That she remained in that status up to the time of her death. That Eugene Sol Louie has no lineal descendants, or any children. He has a father and mother living on the reservation. They are Coeur d'Alene Indians and wards of the government in charge of the witness. That the land to which Eugene Sol Louie received his patent, lies within the Coeur d'Alene Indian Reservation, that is, the limits prior to the time the last cession was made. That these facts existed prior to the first day of May, 1919. That the plaintiff in error had received his patent before that time. (P. 16-18). That the description of the land patented by the government to the defendant, is the West Half of the Southeast quarter, and the East Half of the Southwest quarter of Section 11, Township 44 North of Range 5 West; that all of the land that was formerly the Coeur d'Alene Indian Reservation and not ceded, was not allotted to the Indians. There are no Indians on that reservation to whom allotments have not been made by the government except those born since May 2, 1910. That there are no tribal lands on that reservation at all. The status of the land is all of the land that had not been allotted was open to settlement on May 2, 1910, and of that land that was opened to settlement, there are about 18,000 acres that have not been settled upon. That is yet open. It all lies within the reservation as shown by the maps from the Indian Department. The reservation is shown on the maps, its shape. A part of it is in blue for the allotments, and the rest of it in white showing that it was land that

was opened to settlement. That he knew of the death of Adeline Sol Louie; she was residing on the land that was patented to the plaintiff in error at the time of her death. That this 18,000 acres which has not been settled on, was included in the cession by the Coeur d'Alene tribe back to the United States. They are interested in it in this way,—they get the money it would sell for. The land itself is owned by the government and platted and thrown open to entry by the white people. The Indian lands now consist of the individual allotments in severalty to the members of the tribe, and certain townsites on the reservation. The townsites are owned by the government and they are sold by the general land office and the money goes into a fund that is to be distributed prorata among the Indians. The proceeds arising from the sale of this 18,000 acres is turned over to the Indians and divided among them per capita. The government holds the title to that land in fee simple now. By this cession, the Indians relinquished their rights to the land, and when the patent comes to the purchasers, they are made direct to the purchaser from the United States. The price of the land is fixed by an appraising commission. Every forty acres is appraised at a certain price. There is a proviso, however, that if the land is not sold by a certain period, it might be sold at any valuation it might bring. This 18,000 acres consisted of land on top of the mountain peaks, which no one considered desirable, and it still remains unsold. That he does not exercise any supervision over plaintiff in error, except that he has to do with his part of the money that is in the United States Treasury, and that is yet unpaid. That Eugene Sol Louie has had one share of one distribution

of that money. This is the common fund that arises from the sale of the land. As to this particular allotment, he lives on that and does as he pleases, and if he wanted to rent it, he could rent, or if he wanted to sell it, he could sell it. (P. 19-21).

That upon the conclusion of the above testimony, it was stipulated in open court by the United States Assistant Attorney, Mr. Smead, and the attorneys for the plaintiff in error, as follows: That the injuries to Adeline Bohn Sol Louie, and mentioned in the indictment, were sustained by her upon the land mentioned in the testimony of witness Colgrove, viz., the West Half of the Southeast quarter, and the East Half of the Southwest quarter of Section 11, Township 44 North of Range 5 West, which prior thereto had been patented in fee to plaintiff in error, and that after receiving such injuries, deceased was removed from said lands to the allotment of one Nancy Lawrence Moctelme, where she died. Immediately following this stipulation, plaintiff in error, by his counsel, made the following objection and motion:

"Upon the testimony of the witness Colgrove, and the stipulation made and entered into by the respective counsel in open court, and the further statement of the District Attorney that there would be no further or additional evidence offered with reference to the status of the defendant or the lands allotted to him and testified to by the witness Colgrove, the defendant objects to any further testimony in this case, and moves that the case be dismissed, for the reason that this court has no jurisdiction of the case, for the reason that the testimony clearly shows that the defendant is not an Indian under the control or

superintendency of an Indian Agent or Superintendent; that he has been declared and adjudged by the government as competent to manage his own affairs, and that a patent to lands lying upon the so-called Coeur d'Alene Indian Reservation has been alloted to him, and that the injuries received by the deceased Adeline Bohn Sol Louie, were received by her upon these lands so patented to the defendant, and that they are not within or properly speaking a part of the Coeur d'Alene Reservation."

The court reserved his ruling upon said objection and motion, and took the same under advisement pending the hearing of further testimony. (21-23).

Dr. E. W. Hill testified on behalf of the government, that he is in the employ of the government at Desmet, Idaho, as medical officer for the Indian service on the Coeur d'Alene Reservation, and that he has been in such service for about two and one-half years. That he was at Tensed on the 5th of May, and received a telephone call from the Mission requesting him to see a young woman who was seriously injured. That he arrived there about a quarter of eight on May 5th. He found a girl practically unrecognizable from wounds. She was Adeline Bohn Sol Louie, the wife of Eugene Sol Louie, the plaintiff in error. She was at the house of Nancy Lawrence. That he is official physician for the United States government in the Indian service, and was appointed by the Indian Bureau. He is paid a salary and for that compensation serves the Indians without charge. It would be his duty to serve any Indian on the reservation without charge. The territory covering

his employment is officially known and referred to as the Coeur d'Alene Indian Reservation.

Witness Colgrove was recalled and testified further as follows:

"By a treaty stipulation with the Coeur d'Alenes, the United States agrees to provide a physician and blacksmith and a carpenter, and medicines for the Coeur d'Alenes and for that purpose, and embodied in the Indian bill, there is appropriated annually the sum of $3000.00. The duties of the physician under that is, to take care of all of the Indians. The physician cares for all the Indians, and the blacksmith does the work, and the carpenter does the work of the Indians on the reservation. However, by agreement, the carpenter has been changed to lease clerk, so that the money that formerly paid the carpenter's salary, now pays the lease clerk. This money is paid from an appropriation made by Congress, known as the Coeur d'Alene Support. That takes care of all of the Indians in that way within the limits of the old reservation; all of the Indians on our census roll. The census roll includes both the allotted Indians and the Indians that have received patent, and all. That roll contains the names of all emancipated Indians.

The place where the deceased died is not on the defendant's allotment. It is in the townsite. Nancy Moctelme bought three lots and houses in the townsite of Tensed, and the girl had been removed there before I got out. The defendant's wife, who died, had not been emancipated in any formal way. Her land is still under trust. Her allotment is still under trust. This land in the townsite,—these lots, are not held in trust. They have been built on and sold. They have town lot sales,

and these lots have been sold and patented and patents issued to purchasers, and she purchased. I don't know whether it was the first exchange, but she purchased from someone who purchased from the government. She bought this property after the property had been sold and houses erected thereon. She bought the houses and lots." (P. 23-25).

The above testimony is all that was introduced upon the trial of the case pending to show the status of plaintiff in error, as is shown by the bill of exceptions certified to by his Honor, the Trial Judge, at page 25 of the record as follows:

"Be it further remembered, that no other or further testimony of proof was introduced, had, taken or given upon the trial of said cause with reference to the status of the defendant, Eugene Sol Louie, or with reference to the status of the deceased, Adeline Bohn Sol Louie, at the time of the commission of the alleged crime, or at any other time, and that no other or further testimony was produced, had, given, or taken upon the trial of said cause with reference to the place where the said Adeline Bohn Sol Louie received the injuries from which she died."

There was adduced upon the trial of the cause by the United States, other evidence relating to the *corpus delicti.*

At the conclusion of the evidence introduced on behalf of the government, plaintiff in error, by his counsel, renewed the objection and motion above mentioned, and the court overruled and denied the same, to which ruling plaintiff in error then and there duly excepted, and exception was allowed. (P. 26).

Thereupon the defendant to maintain the issues on his part, called witnesses who were sworn and testified.

That there was a substantial conflict in the testimony, except in so far as the same related to the status of plaintiff in error and of deceased, and as to the place of the crime.

The evidence on behalf of the United States, and plaintiff in error, both clearly shows that at the time of the commission of the crime charged in the indictment, and of which plaintiff in error was convicted, and for some time prior thereto, the plaintiff in error had been declared competent by the duly qualified authorities of the Department of Indian Affairs to transact his own business and affairs, and that a patent had been issued to him by the United States for the West Half of the Southeast quarter, and the East Half of the Southwest quarter of Section Eleven, Township Forty-four North of Range Five West, in fee, and that the deceased, Adeline Bohn Sol Louie, was a Coeur d'Alene Indian, a ward of the government, and was residing upon said lands with defendant and that she received the injuries from which she died, on said lands, and that after sustaining said injuries and before her death, she was removed to the home of Nancy Lawrence Moctelme, on patented lots in the townsite of Tensed, Idaho, where she died, and was so certified to by his Honor, the trial judge, in settling the bill of exceptions herein. (P. 27).

After rendition of the verdict finding plaintiff in error guilty of murder in the second degree, and upon being arraigned in open court for judgment and sentence, plaintiff in error, by his counsel, moved the Honorable trial court, to arrest judgment upon said verdict as follows:

"And now after verdict against the said defendant and before sentence, comes the said defendant in his own person, and by McFarland & McFarland, his attorneys, and moves the Court here to arrest judgment herein and not pronounce the same for the following reasons, to-wit:

1. Because this Honorable Court has not jurisdiction of the person of said defendant, because the indictment shows upon the face thereof that prior to the commission of the crime charged, the defendant was not a ward of the government, had been emancipated and adjudged and declared competent by the duly qualified authorities of the Department of Indian Affairs of the government of the United States of America to conduct and transact his own affairs and business and protect himself and property, and because the evidence clearly shows that the assault committed and the injuries inflicted upon the said Aedline Bohn Sol Louie, the deceased, and of which she died, were committed and inflicted upon her at and upon the West One-half (W 1-2) of the Southeast quarter (SE 1-4) and the East One-half (E 1-2) of the Southwest quarter (SW 1-4) of Section Eleven (11), Township Forty-four (44) North of Range Five (5) West, and that at said time said lands and the whole thereof had been patented by the government of the United States to the said defendant, and the said defendant then and there held title in fee thereto.

2. That this Honorable Court has not jurisdiction of the crime charged against said defendant or the subject matter thereof, because the indictment shows upon the face thereof that prior to the commission of the crime charged, the defendant was not a ward of the government, had been emancipated

and adjudged and declared competent by the duly qualified authorities of the Department of Indian Affairs of the government of the United States of America, to conduct and transact his own affairs and business and protect himself and property, and because the evidence clearly shows that the assault committed and the injuries inflicted upon the said Adeline Bohn Sol Louie, the deceased, and of which she died, were committed and inflicted upon her at and upon the West One-half (W 1-2) of the Southeast quarter (SE 1-4), and the East One-half (E 1-2) of the Southwest quarter (SW 1-4) of Section Eleven (11), Township Forty-four (44) North of Range Five (5) West, and that at said time said lands and the whole thereof had been patented by the government of the United States to the said defendant, and the said defendant then and there held title in fee thereto, because of which said errors in the record herein, no lawful judgment can be rendered by the court upon the record in this cause."

Which said motion was denied by the court, and to which ruling of the court, the plaintiff in error then and there duly excepted, and assigned the same as error. And thereupon the court rendered its judgment upon said verdict as follows:

"It is hereby considered and adjudged that said defendant, Eugene Sol Louie, be imprisoned in the United States Penitentiary at McNeil's Island, Washington, for the term of twelve (12) years, and it is further ordered and adjudged that said defendant be, and is hereby remanded to the custody of the United States Marshal for Idaho, to be by him delivered into said prison and to the proper officer or officers thereof." (P. 15-16).

Within the time provided therefor by law and the order of the court, a bill of exceptions containing the ruling of the court, and the exceptions upon the matters above stated, was duly proposed, presented, settled and allowed, and thereafter a petition for writ of error, assignment of errors, and praecipe for record, were duly and regularly filed herein, and the cause is now properly before this Honorable Court upon the return of the writ of error and the record so made in this action.

## SPECIFICATION OF ERRORS.

The plaintiff in error specifies and assigns the following errors upon which he relies, to-wit:

"1 The indictment herein is insufficient and does not state facts sufficient to constitute or charge any crime against the laws of the United States of America, nor any offense under Section 273 of the Penal Code of the United States.

2. The indictment herein shows upon the face thereof that this court has not jurisdiction of the person of the defendant.

3. The indictment herein shows upon the face thereof, that this court has not jurisdiction of the subject of this cause or action.

4. The trial court erred during the progress of the trial, in over-ruing defendant's objection to the admission of any further testimony, after the conclusion of the testimony of Dr. E. W. Hill, for the reason that the evidence disclosed the fact that the defendant was an emancipated Indian, had received his patent in fee, and that the injuries sustained by the deceased, and from which she died, was inflicted upon her upon the lands

patented to the defendant by the United States, and this court has not jurisdiction of said cause.

5. The trial court erred in over-ruling and denying defendant's motion to dismiss this cause at the conclusion of the testimony of said witness Hill, for the reason that the evidence disclosed the fact that the defendant was an emancipated Indian, had received his patent in fee, and that the injuries sustained by the deceased, and from which she died, was inflicted upon her upon the lands patented to the defendant by the United States. and this court has not jurisdiction of said cause.

6. The trial court erred at the close of the testimony for the United States in over-ruling and denying defendant's motion to dismiss said cause, for the reason that the evidence clearly shows that at the time of the commission of the crime charged, the defendant had been declared by the Indian Department of the United States, competent to manage his own business and affairs, had been emancipated and there had issued to him a patent for the lands included in an allotment previously made by the United States to him, and that the crime charged was committed upon said lands, and not upon an Indian Reservation, and that the injuries or wounds received by the deceased, and of which she died, were received upon the said lands and premises, and not upon an Indian Reservation, and that the deceased died upon patented land, and not upon an Indian Reservation, and the court did not have jurisdiction over the person of the defendant, or the subjects of said action.

7. The trial court erred in denying the motion in arrest of judgment on behalf of defendant, in this, that the indictment

shows upon the face thereof that this court has not jurisdiction of the defendant, for the reason that he has been declared or adjudicated competent to transact his own business and affairs.

That the testimony shows that the defendant, prior to the commission of the crime charged, was a Coeur d'Alene Indian, but had been declared and adjudicated competent to transact his own business, had been duly emancipated and had received from the United States a patent in fee to certain lands situated upon the Coeur d'Alene Indian Reservation, and that the injuries received by the deceased, and from which she died, were sustained upon said lands and premises, after the defendant had been so emancipated, and received said patent, and that the deceased died upon other patented lands and not upon the Coeur d'Alene Indian Reservation, and the trial court, for the above reasons, did not have jurisdiction of the subject of the action, or of the person of the defendant.''

## UNDISPUTED AND CONCEDED FACTS.

All of the following facts are either conceded by both plaintiff in error and defendant in error, or are undisputed, viz:

1. That plaintiff in error and the deceased, Adeline Bohn Sol Louie, were at the time of the commission of the alleged crime herein, Indians and members of the Coeur d'Alene tribe of Indians, and resided within the boundaries of what is known as the Coeur d'Alene Indian Reservation in Benewah County, State of Idaho.

2. That plaintiff in error prior to the commission of said alleged crime, had been declared competent to manage and transact his own business and affairs, and had received a patent in fee from the United States Government to said lands situ-

ated within the boundaries of said Indian Reservation, and was residing thereon, and was authorized and empowered to lease, mortgage, or sell and convey said lands without any restrictions whatever.

3. That the wounds sustained by Adeline Sol Louie, and of which she died, were inflicted upon her upon the lands patented in fee to plaintiff in error as aforesaid, and that after sustaining said injuries, she was removed from said lands into the town of Tensed upon a town lot or piece of land which had theretofore been patented to another party, and there died.

4. That at all of the times herein stated, the said Adeline Bohn Sol Louie was the wife of plaintiff in error, and a ward of the Government.

## ARGUMENT AND AUTHORITIES.

Counsel for plaintiff in error and defendant in error, agree that the only question which this Honorable Court is called upon to determine, is,—Did the United States District Court for the District of Idaho, Northern Division, have jurisdiction of said cause?

We contend that it did not, because the indictment alleges that at the time of the commission of the crime charged, plaintiff in error had been declared competent by the duly qualified authorities of the Department of Indian Affairs (P. 7-8), and the evidence above quoted clearly shows, that plaintiff in error was an emancipated Indian, had received a patent in fee to certain lands situated within the boundaries of the Coeur d'-Alene Indian Reservation, and could without any restriction whatever, dispose of or convey the same. That the crime charged, or rather the assault made upon the deceased, and of

which she died, was committed upon said lands, after which deceased was moved therefrom onto other lands within the boundaries of said reservation, where she died in consequence of the injuries sustained by her by reason of such assault, and the learned Judge who tried the case found, that at the time of the commission of the crime charged, and of which plaintiff in error was convicted and for sometime prior thereto plaintiff in error had been declared competent by the duly qualified authorities of the Department of Indian Affairs, to transact his own business affairs, and that a patent had been issued to him by the United States, for the West Half of the Southeast quarter, and the East Half of the Southwest quarter of Section Eleven, Township Forty-four North of Range Five West, in fee, and that the deceased, Adeline Bohn Sol Louie, was a Coeur d'Alene Indian, a ward of the government, and was residing upon said lands with defendant, and that she received the injuries from which she died, on said lands, and that after sustaining said injuries, and before her death, she was removed to the home of Nancy Lawrence Moctelme on patented lots in the townsite of Tensed, Idaho, where she died, (P. 26-27).

Knowing just what authorities were submitted to his Honor, who tried the case, upon the argument of the objection and motion to dismiss, and the motion in arrest of judgment, we are warranted in assuming that the learned Judge's rulings in over- ruling the objection and motion to dismiss, and in denying the motion in arrest of judgment, were based upon United States vs. Celestine, 215 U. S., 278 (54 L. Ed. 195), and State vs. Columbia George, 65 Pacific, 604, neither of which parallels the case at bar.

In United States vs. Celestine, supra, the court held that neither the treaty with the Omaha's March 16, 1854, (10 Stat. At L. 1043), or the treaty of Point Elliott of January 22, 1855, (12 Stat. At L. 927), which provides for a conditional alienation only, or the Act of March 3, 1885, paragraph 9, or the Act of February 8, 1887 (24 Stat. At L. 388, Cahp. 119) defeats the exclusive jurisdiction of the Federal Courts of crimes committed by one Indian upon the person of another on the Tulalip Reservation in the State of Washington. In our opinion this case is not at all in point. For as may be easily observed, the treaty with the Omahas and the treaty of Point Elliott, as well as the Act of February 8, 1887, established the status of Celestine greatly and materially different to that of the plaintiff in error. In that case the court says among other things:

"The fact of the patent to Chealco Peter, is all that is claimed shows a want of jurisdiction of the United States over the place of the offense, but the conditions of the treaty with the Omahas made by reference a part of the treaty with the Tulalip Indians, providing for only a conditional alienation of the lands, make it clear that the special jurisdiction of the United States has not been taken away."

In the Celestine case, the Supreme Court was called upon to determine the question of the jurisdiction of the Circuit Court of the United States for the western District of Washington, to try an Indian who was prosecuted for the murder of another Indian within the Tulalip Indian reservation, and the holding in that case was based upon the ground that the Tulalip Indians had taken their allotments pursuant to the treaty with the Omahas of March 16, 1854 (10 Stat. at L. 1043) and the

treaty of Point Elliott of January 22, 1855 (12 Stat. at L. 927), and that Indians taken under those treaties were not subject to the laws, both civil and criminal, of the state or territory in which they may reside, but were subject to the provisions of the Act of March 3, 1885 (23 Stat. at L. 385) whereby Congress reserved to the Federal Courts the exclusive jurisdiction to prosecute Indians for certain offenses therein named, including murder and larceny.

The Act of May, 1906, c. 2348, (34 Stat. 182), provided:

> "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside, and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. Provided, the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent; Provided, further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States; And provided further, That the provisions of this Act shall not extend to any Indians in the Indian territory."

Barnes Federal Code, p. 801, Section 35981.

The patent in fee issued by the Government to the plaintiff in error, was made under the provisions of this section, and plaintiff in error received a different title to that issued to Celestine as is shown by the record in this case, he having an un-

conditional title in fee simple, one which cannot be cancelled, defeated or set aside, by the Government, and unconnected with any restriction as to alienation, whereas the title of Celestine was conditional and could have been forfeited. Even his patent was subject to canncellation by the President, and he was denied thereby the right of alienation.

In the Act of May 8, 1906, above quoted, we find this language:

> "Provided further, That until the issuance of fee-simple patents, all allottees to whom trust patents shall hereafter be issued, shall be subject to the exclusive jurisdiction of the United States."

Now, the question naturally arises—after the issuance of fee-simple patents, do not such allottees cease to be subject to the exclusive jurisdiction of the United States? We cannot comprehend how any other construction can reasonably be given to that provision. In the last paragraph of the opinion of the court in the United States v. Celestine, supra, the court says:

> "The Act of May 8, 1906, (34 Stat. at L. 182, p. 2348) extending to the expiration of the trust period the time when the allottees of the Act of 1887 shall be subject to state laws, is worthy of note as suggesting that Congress in granting full rights of citizenship to Indians believed that it had been hasty."

Our construction of this language is that it strongly holds with our view that the trial court did not have jurisdiction of this cause.

A number of courts have announced the opinion concerning the attitude of Congress towards Indians, in this language:

> "Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the sep-

> arate Indians in individual homes, free from national guardianship, and charged with all the rights and obligations of citizens of the United States. Of the power of the government to carry out this policy there can be no doubt. It is under no constitutional obligations to perpetually continue the relationship of guardian and ward. It may, at any time, abandon its guardianship, and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear, the question is at end.''

It will be conceded by the Government in this case, and the record shows (p. 19) that the tribe of Coeur d'Alene Indians ceded to the Government all of that property of the Coeur d'Alene Indian Reservation not allotted in severalty to the Indians, and on May 2, 1910, the Government opened said lands to settlement by homesteaders, and there now remains of the lands not allotted to the Indians and not claimed and entered by homesteaders about 18000 acres. That this act of cession by the Coeur d'Alene Indian tribe and the opening of the remaining lands not allotted to Indians by the Government for settlement, did not work any change in the boundaries of the Coeur d'Alene Indian Reservation, and the fact is, that there are a number of white settlers to whom patents have been issued, residing at the present time within the boundaries of said reservation, and the 18000 acres of undisposed land, and which is subject to entry and sale, are within the boundaries of said reservation, and that there are no tribal lands within the boundaries of said reservation.

When plaintiff in error was emancipated and a patent in fee isued to him by the Government conveying to him without reservation, restriction or condition, the lands described in the testimony herein, such lands were severed from the Coeur d'Alene Indian Reservation and were no longer a part thereof, and were not in any sense reserved lands or a part of the Coeur d'Alene Indian Reservation, and more than the lands conveyed by patent in fee to the white homesteaders within the boundaries of said reservation. That being true, the crime charged was not committed upon an Indian Reservation, and the plaintiff in error having received his patent in fee without reservation or restriction and unconditionally, is not amenable to the Federal Court, and the trial court in our opinion had no jurisdiction of the cause.

The other case upon which the trial court relied for his rulings, State v. Columbia George, 65 Pac. 604, in our opinion is not in point, and lends no aid in determining whether the trial court had jurisdiction in this cause. Columbia George, as the opinion shows, was a Umatilla Indian, and an allottee under a special act of Congress, and his status was established by the treaty of June 9, 1855, the Act of March 3, 1885 (23 Stat. 340 c. 319) and the Act of February 8, 1887 (24 Stat. 388 c. 119) known as the "Daws Act." The patents issued under the terms of the treaty provided that the United States hold the lands thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians, and that at the expiration of such period it would convey the same in fee by patent. Thus it is clearly shown that the status of Columbia George was not at all similar to that of the plaintiff in error.

Our contention is that the trial court was without jurisdiction, is sustained by the following authorities:

State v. Lott, 123 Pac. 491.
In Re Now-Gl-Zhuck, 76 Pac. 877-879.
State v. Nimrod, 138 N. W. 377.
State v. Tilden, 27 Idaho, 262.
People v. Daly, 38 Am. & Eng. Ann. Cas. 376.
In Re Heff, 196 U. S. 592 (49 L. Ed. 848).

The judgment herein should be reversed and the court below directed to dismiss the action, or give such other direction for the relief of plaintiff in error as may be in harmony with law and justice.

Respectfully submitted,

R. E. McFARLAND, and
McFARLAND & McFARLAND,
Attorneys for Plaintiff in Error,
P. O. Address:
Coeur d'Alene, Idaho.

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT



EUGENE SOL LOUIE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

## BRIEF OF DEFENDANT IN ERROR

**Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.**

J. L. McCLEAR,
United States Attorney.

J. R. SMEAD,
Assistant U. S. Attorney.
Attorneys for Defendant in Error.
Boise, Idaho.

PRESS OF AL KENNARD, 319 N. EIGHTH, BOISE

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

---

EUGENE SOL LOUIE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

---

# BRIEF OF DEFENDANT IN ERROR

---

**Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.**

---

J. L. McCLEAR,
United States Attorney.

J. R. SMEAD,
Assistant U. S. Attorney.
Attorneys for Defendant in Error.
Boise, Idaho.

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

---

EUGENE SOL LOUIE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

---

# BRIEF OF DEFENDANT IN ERROR

---

**Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.**

---

### STATEMENT OF THE CASE

Defendant in error accepts the statement of the case of plaintiff in error, with the exception that it is claimed on the part of defendant in error that no cession of the lands of the Coeur d'Alene Indian Reservation has been made since 1899, and that the reservation is now and has, since the above date, remained the same as it was left at that time. It is claimed on the part of the defendant in error that by the treaty between the Coeur d'Alene Indians and the Government of the United States entered into in 1887, and ratified by Congress in 1891, the land comprising the Coeur

d'Alene Reservation was reserved as a home for the Indians then inhabiting it, and should forever remain Indian land and a reservation until changed by agreement with the Indians. The defendant in error also agrees with the statement on page 19 of the brief of plaintiff in error, to-wit: the only question which this Honorable Court is called upon to determine is, did the United States District Court for the District of Idaho, Northern Division, have jurisdiction of this case?

## ARGUMENT AND AUTHORITIES

The indictment in this case is under the last part of Section 328 of the Federal Penal Code of 1910, as follows:

> "And all such Indians committing any of the above-named crimes, to-wit, (murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary and larceny), against the person or property of another Indian or other person within the boundaries of any State of the United States and within the limits of any Indian Reservation shall be subject to the same laws, tried in the same courts and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

It is conceded by plaintiff in error, page 18 of his brief, "That plaintiff in error and the deceased, Adeline Bohn Sol Louie, were, at the time of the commission of the alleged crime herein, Indians and members of the Coeur d'Alene tribe of Indians, and resided within the boundaries of what is known as the Coeur d'Alene Indian Reservation in Benewah County, State of Idaho."

In view of the above concession, the only thing to be decided is, did the patent in fee to Eugene Sol Louie result in

placing the land described in the patent to him outside the limits of the Coeur d'Alene Reservation, and did the patent in fee to him place him outside the jurisdiction of the Federal Court and within the jurisdiction of the State Court? In the treaty with the Indians made in 1887, and ratified by Congress in 1891, by which the northern part of the then reservation was open to settlement, 26 Stat. at Large, page 1028, Article 5 of said agreement, states as follows:

> "In consideration of the foregoing cession and agreements, it is agreed that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, now residing on said reservation, and the Spokane or other Indians who may be removed to said reservation under this agreement, and their posterity; and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation."

There was another agreement or treaty with the Coeur d'Alene Indians in 1899 by which the townsite of Harrison, and a small body of land adjacent thereto, was disposed of and open to settlement, but this is on the east side of Coeur d'Alene lake and has no reference to the Coeur d'Alene Indian reservation as we know it now or as it was in 1906 at the time the Act of Congress was passed providing for the allotment of lands to Indians in severalty and after the allotments were made throwing the remainder open to settlement by white people. The treaty of 1899 regarding the Harrison tract was the last treaty made with the Coeur d'Alene Indians. The treaty of 1887, ratified in 1891, states that this was ever to remain Indian country and home for the Indians. The land in the reservation under that treaty

remains an Indian reservation, or Indian country, until such time as it is taken from the reservation or declared not to be a reservation by treaty. Such has never been done. The Act of Congress of 1906, 34 Stat. at Large, page 335, does attempt to do away with the reservation.

34 Stat. 335.

"That the Secretary of the Interior be, and he is hereby authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands in the Coeur d'Alene Indian Reservation, in the State of Idaho.

"That as soon as the lands embraced within the Coeur d'Alene Indian Reservation shall have been surveyed, the Secretary of the Interior shall cause allotments of the same to be made to all persons belonging to or having tribal relations on said Coeur d'Alene Indian Reservation, to each man, woman and child one hundred and sixty acres, and, upon the approval of such allotments by the Secretary of the Interior, he shall cause patents to issue therefor under the provisions of the general allotment law of the United States.

"That upon the completion of said allotments to said Indians the residue or surplus lands—that is, lands not allotted or reserved for Indian school, agency, or other purposes—of the said Coeur d'Alene Indian Reservation shall be classified under the direction of the Secretary of the Interior as agricultural lands, grazing lands, or timber lands, and shall be appraised under their appropriate classes by legal subdivisions, and, upon completion of the classification and appraisement, such surplus lands shall be opened to settlement and entry, under the provisions of the homestead laws, at not less than their appraised value, in addition to the fees and commissions now prescribed by law for the disposition of lands of the value of one dollar and twenty-five cents per acre, by proclamation of the President, which proclamation shall prescribe the manner in which these lands shall be settled upon, occupied, and entered by persons entitled to make entry thereon."

We believe it requires no authority to establish the point that a statute in violation of a treaty provision must fail of validity. The Act of Congress last quoted, and the general allotment act, known as the Dawes Act, together with a third Act of Congress empowering the Secretary of the Interior to shorten the trust period in the case of an allotment held by an Indian whom the Secretary may deem competent to manage his own affairs, are the only provisions of the law which militate against the provisions of the treaty in question. No other treaty with the Coeur d'Alenes touches upon this question, and, therefore, the treaty provision in question remains the solemn and binding agreement between the Coeur d'Alene tribe and the United States. This treaty has never been annulled, unless the Act last quoted, throwing a part of the reservation open for white entry, be deemed an annulment so far as that part of the reservation is concerned. That question does not arise here, since the land where the crime here involved was committed was a part of the land by the same Act, as well as by the treaty of 1887, specifically reserved for the Indians. Certainly the treaty provision, that the reservation should remain forever Indian land and be held as homes for the Indians, must control at least the lands particularly and specifically set apart as such homes. We may even further concede, for the sake of argument only, that the allotment in severalty to the individual members of the tribe of that part of the reservation reserved to the Indians, as distinguished from that part thrown open to white entry, was valid, on the theory that such allotting in severalty did not deprive the land of its character under the treaty as Indian land and Indian homes; but when it is attempted to be said that the general allot-

ment act, the special act opening a part of the reservation to whites, or the act generally empowering the Secretary to shorten the trust period of Indian allotments in general, are authority for the proposition that in this case the Secretary could issue a patent in fee to Eugene Sol Louie and thereby free this land of all restrictions, and enable him to pass a title to a white man, such a statement is merely to say, that these Acts of Congress have practically annulled the provisions of the treaty. We submit that no such thing has been done by Congress. Mere general legislation cannot be held to have such an effect.

Treaties with Indian tribes have always and uniformly been held to be obligations of the most solemn and sacred character, binding upon the United States in every particular. The status of an Indian tribe is, and always has been, entirely different from the status of an Individual Indian. The individual Indian is a ward of the United States, and the usual rights and duties attaching to that relation have always been observed. But an Indian tribe has always been recognized as having the right to treat with the United States. Both the Executive and the Congress have always recognized this right, and, in fact, it has never been questioned. The sacred character of the obligation of such a treaty has never been doubted, but, on the contrary, that character has been at all times more emphatically attributed to Indian treaties than to treaties with any other peoples or Governments. This is naturally so, because of the disparity existing between the parties.

We submit that, conceding the validity of white settlements on part of this reservation, and the validity of the allotments in severalty of the Indian lands, neither of which

questions are necessarily involved here, the obligations of the treaty of 1887 are such that the land reserved to the Indians must remain so reserved, and must retain its character as Indian land exclusively, until such time as that provision is changed by another treaty between the parties.

As appears from the above, the allotments of the Coeur d'Alene Reservation were made under the general allotment law of the United States as found in 24 Stat. at Large, 388, and known as the Dawes Act, and in Section 5 thereof we find as follows:

> "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

and thus it is shown that this case is similar to the case of the State vs. Columbia George, 65, Pac. 605, in that lands allotted under the general allotment law would be held in trust for a period of twenty-five years. In any view of the case, the Secretary could not divest the land of its Indian character, nor empower an individual Indian to do so.

The Coeur d'Alene Indian Reservation being by treaty of 1887, ratified in 1891, reserved as Indian land and homes for the Indians forever, unless by consent of the Indians it may be sold or used for some other purpose, and no treaty

having been made, and the land of the Indians being allotted under the allotment law of the United States, the land whereon Adeline Bohn Sol Louie was killed, namely, the allotment of her husband, and under Section 336, 35 Statute at Large 1152, "the crime is deemed to have been committed at the place where the injury is inflicted" is still, and was, on May 4, 1919, the time of the commission of the crime, the Coeur d'Alene Indian Reservation, and the District Court of the United States for the District of Idaho had jurisdiction of the offense.

United States v. Celestine, 215 U. S. 278, (54 L. Ed. 195.)

Donnelly vs. United States, 228 U. S. 242, (57 L. Ed. 820).

Ex parte Van Moore, 221 Fed. 954.

United States v. Fred Nice, 241 U. S. 591, (60 L. Ed. 1192).

United States v. Sandoval, 231 U. S. 26, (58 L. Ed. 107).

Johnson v. Geralds, 234 U. S. 420, (58 L. Ed. 1383).

In the Celestine case, we find the following language:

"Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race, and the crime was committed by one Indian upon the person of another, and within the limits of a reservation. Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of a reservation; at any rate, it cannot be said to be clear that Congress intended, by the mere grant of citizenship, to renounce entirely its jurisdiction over the individual members of this dependent race. There is not in this case in terms a subjection of the in-

dividual Indian to the laws, both civil and criminal, of the State; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States."

Plaintiff in Error cites in his brief the case of in re Heff, 196 U. S. 592, 49 L. Ed. 848, but this case is overruled in the case of United States v. Fred Nice, herein cited.

The Coeur d'Alene Reservation was recognized by Congress as late as 1916 in the Act found in Vol. 39 Stat. at L., page 435.

In the Celestine case the party murdered and the one committing the offense were both Indians having patented land. In that respect it is a little different from the case at bar, as the defendant in this case had a patent to his land but his wife was a ward of the Government, having an allotment which had never been patented, and the question arises in this case, as in so many cases on the different Indian reservations, or among the different tribes of Indians, as to the jurisdiction of the State court or of the Federal court. Especially is this so where an Indian may have an allotment next to a white man who has received a patent or in a case where an Indian may have received a patent and a crime may be committed on lands that have been patented. It seems that from a long line of decisions of the Supreme Court of the United States, part of which have been herein cited, that the policy of the Government is to hold or maintain the control of Indians until such time as Congress by definite act has clearly removed the Indians from the Government's control. There are a number of other considerations in this case that are brought up by the evidence of the Superintendent of the Coeur d'Alene Indian Reservation

and Doctor Hill, the physician in charge, some of which are as follows: The land comprising townsites and 18,000 acres of land unsold on the Coeur d'Alene Indian Reservation when sold and paid for is to be distributed among all of the Indians of the reservation, or the Coeur d'Alene tribe, and the defendant in this case, by the testimony of the Superintendent, receives his pro rata share of the proceeds of the above lands. Congress has appropriated each year for the care and control of the Indians certain amounts to pay for the services of a physician, a blacksmith, carpenter, and others, to look after the welfare of the Indians, and the physician employed looks after all of the Indians irrespective of whether they are allottees or have received a patent, and we respectfully submit that the defendant in this case, although he had received a patent in fee for his land, was yet a ward of the Government, committing the crime within the limits of the Coeur d'Alene Indian Reservation within the State of Idaho, and the United States District Court of the District of Idaho had jurisdiction of the offense.

Respectfully submitted,

J. L. McCLEAR,

J. R. SMEAD,
Assistant U. S. Atty.
Boise, Idaho.

No. 3381

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

---

BRUCE RICHARDS and AUGUST OESS,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

---

# Transcript of Record.

---

**Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.**

---



Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3381

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

BRUCE RICHARDS and AUGUST OESS,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

# Transcript of Record.

**Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.**

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Index. Page

## Names and Addresses of Attorneys.

CHARLES O. BATES, Esquire, National Realty Building, Tacoma, Washington,

CHARLES T. PETERSON, Esquire, National Realty Building, Tacoma, Washington,

GEORGE DYSART, Esquire, Centralia, Washington,

JOHN T. WELSH, Esquire, South Bend, Washington,

MARTIN C. WELSH, Esquire, South Bend, Washington,

C. D. CUNNINGHAM, Esquire, Centralia, Washington,

Attorneys for Plaintiff in Error.

ROBERT C. SAUNDERS, Esquire, United States Attorney, 310 Federal Building, Seattle, Washington,

F. R. CONWAY, Esquire, Assistant United States Attorney, 324 Federal Building, Tacoma, Washington,

Attorneys for Defendant in Error. [1*]

---

## Praecipe for Transcript of Record.

To the Clerk of the Above-named Court:

You will please prepare and certify, to constitute the record on appeal of the above-entitled cause, typewritten copies of the following papers, omitting all captions, excepting the captions to the indictment, omitting all verifications, acceptances of ser-

*Page number appearing at foot of page of original certified Transcript of Record.

vice, file-marks and other endorsements, said transcript of record to be certified and forwarded to and filed in the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, to be printed there according to the rules of said Circuit Court of Appeals:

1. This praecipe.
2. Indictment.
3. Arraignment and pleas of defendants Richards and Oess.
4. Recognizance of each of defendants Richards and Oess.
5. Verdict of jury.
6. Petition for new trial.
7. Order denying petition for new trial and fixing supersedeas bond.
8. Judgment and sentence of defendants Richards and Oess.
9. Supersedeas bonds and approval of each.
10. All orders extending time to present bill of exceptions.
11. Bill of exceptions.
12. Petition for writ of error.
13. Assignment of errors.
14. Order allowing writ of error.
15. The writ of error.
16. Citation in error.
17. Clerk's certificate.

Dated July 18th, A. D. 1919.

GEORGE DYSART,
CHARLES O. BATES,
CHARLES T. PETERSON,

Attorneys for Defendants Richards and Oess. **[2]**

*In the District Court of the United States of America for the Western District of Washington, Southern Division.*

Of the February Term in the year, 1919.

No. 2728.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. F. TOLES, J. P. SYMONS, BRUCE RICHARDS and AUGUST OESS,

Defendants.

**Indictment.**

VIO. SEC. 240, C. C.

The United States of America,
Western District of Washington,
Southern Division,—ss.

The grand jurors for the United States of America, empaneled and sworn in the District Court of the United States for the Southern Division of the Western District of Washington, at the February Term thereof in the year 1919, and inquiring for that division and district, upon their oath present:

That on the 7th day of February, in the year of our Lord nineteen hundred and nineteen, at Centralia, in Lewis County, in the State of Washington, and in the Southern Division of the Western District of Washington, and within the jurisdiction of this court, one W. F. Toles, and one J. P. Symons, and one Bruce Richards, and one August Oess, and one

Joe Lucas, and one J. H. Boomer, and divers other persons to the grand jurors unknown, did commit the crime of conspiracy to commit an offense against the United States of America, to wit, to commit a violation of Section 240 of the Criminal Code of the United States, committed as follows, that is to say:

That at the time and place aforesaid, the said W. F. Toles, and J. P. Symons, and Bruce Richards, and August Oess, and Joe Lucas, and J. H. Boomer, and said other persons to the grand jurors unknown, did knowingly, feloniously, unlawfully and wickedly conspire, combine, confederate and [3] agree together among themselves to ship and cause to be shipped from the State of California into the State of Washington certain packages, the number and a more particular description of which are to the grand jurors unknown, of spirituous intoxicating liquor, to wit, whiskey, without such packages being so labeled on the outside covers thereof as to plainly show the name of the consignee thereof, the nature of the contents thereof or the quantity contained therein.

And the grand jurors aforesaid do further present and charge that at the time and the place aforesaid, to effect the object of said conspiracy, the said W. F. Toles did give, pay and deliver to one Joe Lucas the sum of Forty Dollars, and the said J. P. Symons did give, pay and deliver to the said Joe Lucas the sum of Forty Dollars, and the said Bruce Richards did give, pay and deliver to the said Joe Lucas the sum of Two Hundred and Fifty Dollars, and the said August Oess did give, pay and deliver to the said Joe Lucas the sum of Four Hundred Dollars; contrary to

the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

ROBT. C. SAUNDERS,
United States Attorney.
F. R. CONWAY,
Assistant United States Attorney. **[4]**

---

**Journal Entry Showing Arraignment and Pleas of Defendants Richards & Oess.**

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma, on the 12th day of May, 1919, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings, were the following truly taken and correctly copied from the journal of said court, to wit:

No. 2728.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

W. F. TOLES, J. P. SYMONS, BRUCE RICHARDS and AUGUST OESS,
Defendants.

**Arraignment and Plea.**

Comes now on this 12th day of May, 1919, the above-named defendants W. F. Toles, J. P. Symons, Bruce Richards and August Oess into open court,

each in his own proper person and accompanied by John T. Welsh as their counsel, for arraignment under the indictment herein returned against them in the above-entitled cause, and being asked as to his true name, he answers that his name is as in the indictment stated. The reading of the indictment being waived, defendants are interrogated as to their plea herein, and each answers for himself that he is not guilty as in the indictment charged, whereupon it is ordered that trial of this cause be heard on Wednesday, May 14, 1919, second case. [5]

---

**Recognizance for Appearance Before United States Court (Bruce Richards).**

BE IT REMEMBERED, that on this 10th day of May, A. D. 1919, before me, a United States Commissioner for the said Western District of Washington, personally came Bruce Richards, as principal, and Dan Salzer and Wm. Hoss, as sureties, and jointly and severally acknowledged themselves to owe the United States of America the sum of Fifteen Hundred Dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

THE CONDITION of this Recognizance is such, that if the said Bruce Richards shall personally appear before the U. S. Dist. Court of the United States, in and for the District aforesaid, at Tacoma, Wash., on the first day of the next regular term thereof, and then and there to answer to the charge set forth in a true bill of indictment returned by the

Grand Jurors of the Western District of Washington at the city of Tacoma, Washington, on the 8th day of May, 1919, and then and there abide the judgment of the said Court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

BRUCE RICHARDS. (Seal)
DAN SALZER. (Seal)
WM. HOSS. (Seal)

Taken and acknowledged before me on the day and year first above written.

[Commissioner's Seal] W. A. WESTOVER,
United States Commissioner as Aforesaid.

United States of America,
Western District of Washington,—ss.

Dan Salzer, a surety on the annexed recognizance, being duly sworn, deposes and says that he resides at Centralia in the County of Lewis, in said District, that he is a freeholder in the State of Washington, that he is worth the sum of Fifteen Hundred Dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of a brick block at Lot 1, B. 5, **[6]** Washington's original plat of Centralia, Wash., value $1500.00. That he is unmarried.

(Affiant's signature) DAN SALZER.

Sworn to and subscribed before me, this 10th day of May, A. D. 1919.

[Commissioner's Seal] W. A. WESTOVER,
United States Commissioner as Aforesaid.

United States of America,
Western District of Washington,—ss.

Wm. Hoss, a surety on the annexed recognizance, being duly sworn, deposes and says that he resides at Centralia, in the County of Lewis, in said District, that he is a freeholder in the State of Washington, that he is worth the sum of Fifteen Hundred Dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of one brick building on lot at No. 118 North Tower Avenue, Centralia, Wash., value $10,000.00, and other real estate in Centralia $15,-000.00. That he is unmarried.

(Affiant's signature) WM. HOSS.

Sworn to and subscribed before me, this 10 day of May, A. D. 1919.

[Commissioner's Seal] W. A. WESTOVER,
United States Commissioner Aforesaid.

The within bond approved by me May 18, 1919.

W. A. WESTOVER,
U. S. Com. for Western Dist. of Washington, Residing at Chehalis, Wash. [7]

---

**Recognizance for Appearance Before United States Court (August Oess).**

BE IT REMEMBERED, that on this 10th day of May, A. D. 1919, before me, a United States Commissioner for the said Western District of Washington, personally came August Oess, as principal, and Ralph H. Moore and George Hugh, sureties, and

jointly and severally acknowledged themselves to owe the United States of America the sum of Fifteen Hundred Dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

THE CONDITION of this Recognizance is such, that if the said August Oess shall personally appear before the U. S. District Court of the United States, in and for the District aforesaid, at Tacoma, Wash., on the first day of the next regular term thereof, and then and there to answer to the charge set forth in a true bill of indictment returned by the Grand Jurors of the Western District of Washington at the city of Tacoma, Washington, on the 8th day of May, 1919, and then and there abide the judgment of the said Court, and not depart without leave thereof, then this recognizance to be void, otherwise to remain in full force and virtue.

AUGUST OESS. (Seal)
RALPH H. MOORE, (Seal)
GEORGE HUGH. (Seal)

Taken and acknowledged before me on the day and year first above written.

[Commissioner's Seal] W. A. WESTOVER,
United States Commissioner as Aforesaid.

United States of America,
Western District of Washington,—ss.

Ralph Howard Moore, a surety on the annexed recognizance, being duly sworn, and says that he resides at Centralia, in the County of Lewis in said District, that he is a freeholder in the State of Washington, that he is worth the sum of Fifteen Hundred

Dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of 166 acres of farm [8] land in Sec. 4 (NW. ¼), 11, 16 or 17, in extreme northern part of Yakima Co., Wash., Value $2,000.00, unencumbered. That he is unmarried.

(Affiant's signature.)

RALPH HOWARD MOORE.

Sworn and subscribed before me this 10 day of May, A. D. 1919.

[Commissioner's Seal] W. A. WESTOVER,
United States Commissioner as Aforesaid.

United States of America,
Western District of Washington,—ss.

George Hugh, a surety on the annexed recognizance, being duly sworn, deposes and says that he resides at Centralia in the County of Lewis in said District, that he is a freeholder in the State of Washington, that he is worth the sum of Fifteen Hundred Dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of 90 feet front in Lots 7, 8 & 9, Block No. 14, Chehalis Avenue, Centralia, value $2500.00, unencumbered. Two lots in Galvin Add. to Centralia on South Tower Ave., value $500.00. That he is unmarried.

(Affiant's signature.) GEORGE HUGH.

Sworn to and subscribed before me this 10th day of May, A. D. 1919.

W. A. WESTOVER,
United States Commissioner as Aforesaid.

I certify that I personally examined the sureties in the above bond, and that I approved the same.

[Commissioner's Seal] W. A. WESTOVER,
U. S. Com. for Western Dist. of Washington, Residing at Chehalis, Wash. **[9]**

---

**Verdict.**

We, the jury empanelled in the above-entitled cause, find that the defendant W. F. Toles is not guilty as charged in the indictment; and that the defendant Bruce Richards is guilty as charged in the indictment; and that the defendant August Oess is guilty as charged in the indictment, and that the defendant J. P. Symons is not guilty as charged in the indictment.

FRED EIDEMILLER,
Foreman.

We, the jury, do recommend clemency, relative to Bruce Richards and August Oess.

FRED EIDEMILLER,
Foreman. **[10]**

---

**Motion for New Trial by Defendants Bruce Richards and August Oess.**

Comes now the defendants Bruce Richards and August Oess, and each of them, and move the above-named court to set aside the verdict of the jury in the above-entitled action as to defendants Bruce Richards and August Oess, and to grant to said defendants Bruce Richards and August Oess a new trial for

the following reasons, to wit:

I.

Because the verdict of the jury rendered against the defendants, Bruce Richards and August Oess, and each of them, is contrary to the evidence and is against the evidence.

II.

Because the verdict of the jury rendered as to these defendants, and each of them, is contrary to, and is against the law.

III.

Because the evidence in the above-entitled action is not sufficient upon which to base a verdict of guilty against said defendants Bruce Richards and August Oess, or against any or either of them.

IV.

Because there is a material and fatal variance between the evidence and proofs and the indictment filed in said action and upon which these two defendants, and each of them, was tried, because these two defendants were charged with one specific offense and tried for under a different offense.

V.

Because of errors of law occurring at and in the trial of these two defendants, and excepted to by these defendants, and each of them, at the time.

VI.

Because the jury in the above-entitled action was, after the jury, and each member thereof was sworn and empaneled to try said action, and these two defendants, said jury was permitted to, and did separate during the trial of said action, and before the

[11] final submission of said cause, and said action to the jury for their deliberation and consideration, the said jury and the members thereof were not kept together during the trial of said action, but were permitted to separate each two and until the time when said action was finally submitted to said jury for their consideration of the verdict in said action.

VII.

Because the evidence in the above-entitled action conclusively shows that neither of the defendants, Bruce Richards or August Oess is guilty of the crime charged in the indictment, and the evidence in said action is insufficient to sustain a verdict of guilty against any, or either of the defendants, Bruce Richards and August Oess.

VIII.

Because these two defendants were charged with conspiring with Joe Lucas and one J. H. Boomer, and the center figure, alleged in the indictment, was Joe Lucas, around whom, as alleged in the indictment, all revolved and conspired, and said Joe Lucas and said J. H. Boomer were, and each of them, was acquitted in that the indictment as to each in this cause was dismissed, and this in fact in law acquitted each of these defendants.

GEO. DYSART,
C. D. CUNNINGHAM,
J. T. WELSH,

Attorneys for Defendants Bruce Richards and August Oess. [12]

**Journal Entry Showing Order Denying Petition for New Trial and Fixing Amount of Supersedeas Bond.**

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma on the 9th day of June, 1919, the Honorable EDWARD E. CUSHMAN, United States District Judge, presiding, among other proceedings had were the following truly taken and correctly copied from the journal of said Court, to wit:

No. 2728.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. F. TOLES, J. P. SYMONS, BRUCE RICHARDS AND AUGUST OESS,

Defendants.

**Hearing on Motion for a New Trial.**

Now, on this 9th day of June, 1919, this cause comes on for a hearing on a motion for a new trial, the Government being represented by F. R. Conway, Assistant District Attorney, and defendants Bruce Richards and August Oess being represented by Messrs. John T. Welsh and George Dysart, argument of the motion is made to the Court who denies the motion and exception is allowed. Upon motion of the Government's attorney for judgment at this time, the Court proceeds to impose sentence upon de-

fendants Bruce Richards and August Oess, execution of which is stayed until 5 P. M. on June 10, 1919, before which time and hour a supersedeas bond each in the sum of $2,500 for the defendants Bruce Richards and August Oess is to be approved by W. A. Westover, United States Commissioner for the Western District of Washington, and filed in this cause. [13]

---

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma, on the 9th day of June, A. D. 1919, the Honorable EDWARD E. CUSHMAN, presiding, among other proceedings had were the following, truly taken and correctly copied from the Judgment and Decree record of said Court, to wit:

No. 2728.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. F. TOLES, J. P. SYMONS, BRUCE RICHARDS AND AUGUST OESS,

Defendants.

**Judgment and Sentence of Bruce Richards.**

Comes now on this 9th day of June, 1919, the above-named defendant Bruce Richards into open court in his own proper person for sentence at this time, and being informed by the Court of the indictment heretofore returned against him, and of his conviction of

record herein, he is asked whether he has any legal or just cause to show why sentence should not be passed and judgment had against him at this time, he nothing says save as before he hath said. Wherefore by reason of the law and the premises, it is considered, ordered and adjudged that the defendant Bruce Richards is guilty of the crime of violation of Section 240, C. C., and that he be punished by being sentenced to be confined in the Lewis County jail or in such other prison as may hereafter be provided for the confinement of persons convicted of offenses [14] against the laws of the United States for the period of Sixty days and to pay a fine of $500.00. Defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution, execution of which is stayed until 5 P. M. on June 10, 1919.

**Judgment and Sentence of August Oess.**

Comes now on this 9th day of June, 1919, the abovenamed defendant August Oess into open court in his own proper person, for sentence at this time, and being informed by the Court of the indictment heretofore returned against him in this cause and of his conviction of record herein, he is asked whether he has any legal or just cause why sentence should not be passed and judgment had against him at this time, he nothing says save as before he hath said. Wherefore by reason of the law and the premises, it is considered, ordered and adjudged that the defendant August Oess is guilty of the crime of violation of Section 240, C. C., and that he be punished by being sen-

tenced to be confined in the Lewis County Jail or in such other prison as may hereafter be provided for the confinement of persons convicted of offenses against the laws of the United States for the period of sixty days and to pay a fine of $500.00. Defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution, execution of which is stayed until 5 P. M. on June 10, 1919. [15]

---

**Supersedeas Bond of Bruce Richards.**

KNOW ALL MEN BY THESE PRESENTS, that we, Bruce Richards, the defendant as principal, and S. A. Reeves and W. M. Hoss, as sureties, are held and firmly bound under the United States of America in the penal sum of Twenty-five Hundred ($2,500.00) Dollars, lawful money of the United States of America, for the payment of which sum, well and truly to be made, we bind ourselves and each of our heirs and executors and administrators, jointly and severally, firmly by these presents. Sealed with our seal and dated this 10th day of June, 1919.

The condition of the above obligation is such that

WHEREAS, the above-named principal, Bruce Richards, defendant in the above-entitled action, having been convicted of the crime of conspiracy to commit an offense against the United States of America, to wit, to commit a violation of Section 240, of the Criminal Code of the United States, by a verdict of the jury in the above-entitled court, and having been

sentenced by the Judge of the above-entitled court on the 9th day of June, 1919, to be confined in the County Jail of Lewis County, Washington, for a period of sixty (60) days, and to pay a fine of Five Hundred ($500.00) Dollars, and

WHEREAS, the said defendant having announced his desire to appeal from said judgment and to have the same reviewed by the United States Circuit Court of Appeals of the Ninth Circuit, and immediately after sentence having applied in open court to fix the amount of supersedeas bond herein for the purpose of such appeal, and review, and the Court having fixed such bond in the sum of Twenty-five Hundred ($2,500.00) Dollars with at least two sureties,

NOW, THEREFORE, if the said Bruce Richards, the principal herein, diligently and properly prosecute his appeal or writ of error herein and at all times render himself amenable to and abide the processes and orders of the Court during the pendency of such appeal, or writ of error, and shall duly surrender himself in execution of the sentence imposed [16] upon him in this cause, upon its being affirmed, modified or upon said appeal or writ of error being dismissed by the said United States Circuit Court of Appeals of the Ninth Circuit or in case the judgment of the United States District Court be reversed and the cause remanded for a new trial, if he shall appear before the United States District Court to which the cause may be remanded and submit himself and abide the orders and processes thereof and abide any process or processes issued by either of said courts, then

this obligation shall be null and void; otherwise to remain in full force and virtue.

The sureties herein hereby obligate themselves that in case of a breach of the conditions hereof, the Court may, upon notice to them of not less than ten (10) days, proceed summarily in this action to ascertain the amount such sureties are bound to pay on account of such breach and render judgment thereof against them and award execution therefor.

In witness whereof we have hereunto set our hands and seals this 10th day of June, 1919.

BRUCE RICHARD. (Seal)
S. A. REEVES. (Seal)
WM. HOSS. (Seal)

United States of America,
Western District of Washington,
Southern Division,—ss.

This is to certify on this 10th day of June, 1919, before me, the undersigned United States Commissioner, in and for said district, personally came Bruce Richards, S. A. Reeves and W. M. Hoss, to me known to be the individuals described in and who executed the within instrument in my presence and acknowledged to me that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

[Commissioner's Seal] W. A. WESTOVER,
United States Commissioner, Western District of Washington, at Chehalis therein. [17]

United States of America,
Western District of Washington,
Southern Division,—ss.

S. A. Reeves, a surety on the annexed recognizance, being duly sworn, deposes and says: That he resides at Centralia, Washington, in the county of Lewis in said district; that he is a freeholder in the county of Lewis; that he is worth the sum of $5,000.00 over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of real and personal property, situate in Lewis County, Washington; that he is a single man; that all of said property is his sole and separate property.

S. A. REEVES.

Sworn and subscribed to before me this 10th day of June, 1919.

[Commissioner's Seal] W. A. WESTOVER,
United States Commissioner, Western District of Washington, at Chehalis therein.

United States of America,
Western District of Washington,
Southern Division,—ss.

W. M. Hoss, a surety on the annexed recognizance, being duly sworn, deposes and says: That he resides at Centralia, Washington, in the county of Lewis in said district; that he is a freeholder in the county of Lewis; that he is worth the sum of $5,000.00 over and above all his just debts and liabilities, in property subject to execution and sale and that his property consists of real and personal property situate in

Lewis County, Washington; that he is a single man; that all of said property is his sole and separate property.

WM. HOSS.

Subscribed and sworn to before me this 10th day of June, 1919.

[Commissioner's Seal] W. A. WESTOVER,
United States Commissioner, Western District of Washington at Chehalis therein. [18]

The above bond examined and approved by me this 10th day of June, 1919.

[Commissioner's Seal] W. A. WESTOVER,
United States Commissioner, Western District of Washington, Residing at Chehalis, Washington. [19]

---

**Supersedeas Bond of August Oess.**

KNOW ALL MEN BY THESE PRESENTS, that we, August Oess, the defendant as principal, and Earnest Rector and George Hughes, as sureties, are held and firmly bound under the United States of America in the penal sum of Twenty-five Hundred ($2,500) Dollars, lawful money of the United States of America, for the payment of which sum, well and truly to be made, we bind ourselves and each of our heirs and executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seal and dated this 10th day of June, 1919.

The condition of the above obligation is such that WHEREAS, the above-named principal, August

Oess, defendant in the above-entitled action, having been convicted of the crime of conspiracy to commit an offense against the United States of America, to wit, to commit a violation of Section 240 of the Criminal Code of the United States, by a verdict of the jury in the above-entitled court, and having been sentenced by the Judge of the above-entitled court on the 9th day of June, 1919, to be confined in the County Jail of Lewis County, Washington, for a period of sixty (60) days, and to pay a fine of Five Hundred ($500.00) Dollars; and

WHEREAS, the said defendant having announced his desire to appeal from said judgment and to have the same reviewed by the United States Circuit Court of Appeals of the Ninth Circuit, and immediately after sentence having applied in open court to fix the amount of supersedeas bond herein for the purpose of such appeal, and review, and the Court having fixed such bond in the sum of Twenty-five Hundred ($2,500) Dollars with at least two sureties: [20]

NOW, THEREFORE, if the said August Oess, the principal herein, diligently and properly prosecute his appeal or writ of error herein and at all times render himself amenable to and abide the processes and orders of the Court during the pendency of such appeal, or writ of error, and shall duly surrender himself in execution of the sentence imposed upon him in this cause, upon its being affirmed, modified or upon said appeal or writ of error being dismissed by the said United States Circuit Court of Appeals of the Ninth Circuit, or in case the judgment of the United States District Court be reversed and the

cause remanded for a new trial, if he shall appear before the United States District Court to which the cause may be remanded and submit himself and abide the orders and processes thereof and abide any process or processes issued by either of said courts, then this obligation shall be null and void; otherwise to remain in full force and virtue.

The sureties herein hereby obligate themselves that in case of a breach of the conditions hereof, the Court may upon notice to them of not less than ten (10) days, proceed summarily in this action to ascertain the amount such sureties are bound to pay on account of such breach and render judgment thereof against them and award execution therefor.

In witness whereof we have hereunto set our hands and seals this 10th day of June, 1919.

AUGUST OESS. (Seal)
ERNEST RECTOR. (Seal)
GEORGE HUGHES. (Seal)

United States of America,
Western District of Washington,
Southern Division,—ss.

This is to certify on this 10th day of June, 1919, before me, the undersigned United States Commissioner, in and [21] for said district, personally came August Oess, Earnest Rector and George Hughes, to me known to be the individuals described in and who executed the within instrument in my presence and acknowledged to me that they signed and sealed the same as their free and voluntary act

and deed for the uses and purposes therein mentioned.

[Commissioner's Seal] W. A. WESTOVER,
United States Commissioner, Western District of Washington, at Chehalis therein.

United States of America,
Western District of Washington,
Southern Division,—ss.

Earnest Rector, a surety on the annexed recognizance, being duly sworn, deposes and says, that he resides at Centralia, Washington, in the County of Lewis in said district; that he is a freeholder in the County of Lewis; that he is worth the sum of $5,000.00 over and above all his just debts and liabilities, in property subject to execution and sale and that his property consists of real and personal property, situate in Lewis County, Washington; that he is a single man; that all of said property is his sole and separate property.

ERNEST RECTOR.

Sworn and subscribed to before me this 10th day of June, 1919.

[Commissioner's Seal] W. A. WESTOVER,
United States Commissioner, Western District of Washington at Chehalis therein. [22]

United States of America,
Western District of Washington,
Southern Division,—ss.

George Hughes, a surety on the annexed recognizance, being duly sworn, deposes and says, that he resides at Centralia, Washington, in the county of

Lewis in said district; that he is a freeholder in the county of Lewis; that he is worth the sum of $5,000.00 over and above all his just debts and liabilities, in property subject to execution and sale and that his property consists of real and personal property situate in Lewis County, Washington; that he is a single man; that all of said property is his sole and separate property.

GEORGE HUGHES.

Sworn and subscribed to before me this 10th day of June, 1919.

[Commissioner's Seal] W. A. WESTOVER,
United States Commissioner, Western District of Washington, at Chehalis Therein.

The above bond examined and approved by me this 10th day of June, 1919.

[Commissioner's Seal] W. A. WESTOVER,
United States Commissioner, Western District of Washington, Residing at Chehalis, Washington.

**[23]**

---

**Order Extending Time in Which to Present and File a Bill of Exceptions.**

This cause came regularly on to be heard this 26th day of May, 1919, upon the application of the defendants, August Oess and Bruce Richards, for an extension of time in which to prepare, file, serve and have certified a bill of exceptions in the above-entitled cause, and the Court being fully advised in the premises, it is here now

ORDERED that the defendants have until the

19th day of June, 1919, in which to prepare, file and present to this Court a bill of exceptions as prayed for herein.

Done in open court this 26th day of May, 1919.

EDWARD E. CUSHMAN,
Judge. **[24]**

---

**Order Extending Time to July 19, 1919, to Prepare and Serve Bill of Exceptions.**

Now, on this 14th day of June, A. D. 1919, this cause came on for hearing on the application of the attorneys for the defendants, Richards and Oess, for an order extending the time for the preparation and service of bill of exceptions herein.

On consideration whereof, IT IS BY THE COURT ORDERED, that said defendants have up to and including the 19th day of July, A. D. 1919, in which to prepare and serve bill of exceptions herein.

EDWARD E. CUSHMAN,
Judge. **[25]**

---

**Bill of Exceptions.**

BE IT REMEMBERED that in the trial of this cause on the 16th day of May, A. D. 1919, the Honorable EDWARD E. CUSHMAN presiding, the plaintiff appearing by their respective counsel, the jury was duly empaneled, and the following proceedings had:

**Testimony of Joe Lucas, for Plaintiff.**

JOE LUCAS, being duly sworn as a witness for plaintiff, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

My name is Joe Lucas; I live in Centralia; am engaged in theatrical business there, for the past six years; I know the defendants and one J. H. Boomer and Jack Platt. I contemplated, about February 7th last, a trip from Centralia to San Francisco, and about three weeks before I left I had a talk with August Oess, one of the defendants, in regard to it. He asked me if I would bring him back some whiskey, and I said, "Yes." We had several conversations along the same **[26]** line. These conversations with Oess always referred to when I was going to California. I also had a conversation on the same subject with the defendant, Bruce Richards, about the same time. He asked me if I was going to Frisco and would I bring him back some whiskey, and I told him "yes." I had several subsequent conversations with him. I went to San Francisco on February 8th this year, and about two weeks before I left, Mr. Richards gave me $200.00 at one time and $40.00 at another time, in cash. I asked him what kind of whiskey he wanted and he said he preferred bottled in bond in quart bottles.

I also had a conversation with the defendant Toles, and one with Boomer, and one with Mr. Symons, about bringing back whiskey for them. Toles gave

(Testimony of Joe Lucas.)

me $40.00 and Symons $50.00 to pay for whiskey to bring back for them. I told Symons that I was going to bring back some whiskey to Oess and Richards, and told Oess that I was going to bring Symons $50.00 worth of whiskey.

A few days before I went away I had a talk with Oess and Richards and we discussed about buying whiskey and bringing it into Centralia, and Oess suggested that he drive his truck along the prairie and unload the booze on the prairie into his truck, and Richards says: "That's all right for me." Oess paid me the money for the whiskey about twelve days before I went to Frisco; he gave me $400.00 in bills. Before I went I bought 1,000 dry-cell batteries, or covers, and I shipped them to San Francisco. I bought these a long time ago. At that time, had no intention of ever sending whiskey in them; that occurred to me afterwards. I shipped them down to San Francisco about six or seven days before I went. They were shipped there to bring back whiskey in. There had to be some work done on them and Jack Platt and myself did it on Fillmore [27] Street, San Francisco.

Bottle handed witness, who removed the cork and smelled of it, and said it was whiskey in the bottle, and that he recognized it as one of the same kind of contraptions that they fixed up in San Francisco.

Thereupon said dry-cell case and the bottle containing the whiskey were introduced and received in evidence and marked as Plaintiff's Exhibit 1.

I fixed 1,000 of the little dry battery cases the same

(Testimony of Joe Lucas.)

as this one is fixed. There was whiskey in each one. I got the whiskey in San Francisco. I got the money to buy it from my friends, Richards, Oess, Toles, Symons, and Boomer. Jack Platt helped me fill these bottles. He did most of it. After they were filled, they were filled in regular battery packing cases, and made ready for shipment, and then I left San Francisco.

Box taken out of trunk and shown witness, who testifies that he recognized it with the tag on it. The tag was on the box when it was shipped.

Box with tag offered in evidence and received, marked Plaintiff's Exhibit 2.

Witness shown big trunk and testified that the trunk was his and had lots to do with the shipping of the whiskey. Besides the whiskey contained in the dry-cells, I bought three cases from San Francisco—12 quarts to the case—two cases of Old Taylor and one case of Sunnybrook. It was packed in a regular shipping case.

Box containing dry-cells shown witness who testified that the dry-cell packages were packed in the same manner **[28]** in which the box was packed, and they were then ready for shipment. I did not have anything to do with the delivery for shipment; I left that for Platt to attend to. The shipment was to be made on a boat, by steamer to Seattle. From San Francisco, I went to my father's ranch at Red Bluffs, California. I then went to Seattle, reaching there February 28th. I first learned of the liquor shipment in Seattle, the next day after I got there.

(Testimony of Joe Lucas.)

From there I went to Centralia. About two days after I arrived there, I saw Oess, and told him that I did not ship any whiskey, and that as soon as I got around to it, I would give him his money back. The next day or two I met Oess and Mr. Richards in my apartments. I did not have sufficient money to give them their money back so I told them the facts—that the whiskey had been lost, and showed them a newspaper clipping where the whiskey had been taken, and where Platt was in jail. I told them I had trouble on the other end, which would take some money. After I got through telling Oess and Richards, Oess says: "Joe, you were to bring this whiskey up in a pipe-organ and I do not know, if I had known it was to come in dry batteries, whether I would have gone into it or not." Richard said that he thought it was to be brought up in the pipe-organ also, and seemed to be surprised, and expressed some sentiment that we lost it. They said they figured they should not lose their money and I told them to think it over for a couple of days. If they thought they were right, and I was wrong, that they ought to have their money back, to come to me and I would give it to them. Afterwards, Mr. Richards and Oess and Boomer came to see me at my apartments. Richards says: "We came for our whiskey or our money." I says: "I cannot give you the whiskey," and **[29]** then my wife says: "Give them back their money and pay them in a check." Then it was talked over that we ought to do something for Platt. Mr. Richards says: "Yes, we got him into this, we

(Testimony of Joe Lucas.)

ought to help him out." Mr. Richards had given me $240.00, so I gave him a check in return for $200.00. Oess had given me $400.00, and I gave him a check for $350.00, and Boomer had given me $50.00, and I gave him a check for $45.00.

Exhibit 3, for identification, handed witness, who testified:

"This is the check I gave August Oess, $350.00."

Exhibit 4, for identification, showed witness, who testified:

"This is the check I gave Richards for $200.00."

Exhibits 3 and 4 have been paid.

Checks, exhibits 3 and 4, for identification, offered and admitted in evidence and marked Plaintiff's Exhibits 3 and 4.

After that Mr. Richards was in my apartment—my wife and I and a man named McCormick was there. I saw Richards coming, and I motioned him to come upstairs, and I motioned him to go back, and then for him to stay out there, as I did not want him upstairs. I did not want to get him in trouble by his coming up there when there was a Revenue man there, but he came up there. The Revenue man jumped behind the piano. As Mr. Richards came in, he said: "We're going to pretend that this whiskey was ordered in quart bottles and that our whiskey was delivered and was taken from the Milwaukee depot, and the whiskey that came in is not ours." He told me that McCormick said I told it all; that I had told McCormick that I had told it all. I did not answer. That was about as far as I **[30]** re-

(Testimony of Joe Lucas.)

member about that conversation.

At another time when Richards, Boomer and Oess were present, my wife advised Richards to plead guilty; and he said he would if he knew he could get a fine and not have to go to jail, but he said he would not do one day in jail for $5,000.00, and that he would spend $5,000.00 to keep out of jail, if necessary; that if he thought he was going to be convicted, he would leave. He also said even if they promised them any leniency, that they were not going to let anyone off with a fine; they would take them up separately and fine them and put them in jail. That is the reason he would not plead guilty.

Mr. WELSH.—We move to strike that evidence out, in reference to whether they would plead guilty, on the ground that it is immaterial.

The COURT.—Motion is denied and exception allowed.

Richards also said that if they would convince him that the liquor was lost, he would be satisfied.

At another time, in my apartment, in the presence of Oess and Boomer, Richards said that somebody had squealed; that he thought there was only to be four in this; he said, too many in it, as he looked at it. If he had thought there was going to be more than four in it, he would not have gone into it. He understood that Oess, myself and himself, and Jerry Driscoll were the only ones in it. I didn't hear him make any complaint about Boomer.

(Testimony of Joe Lucas.)

Cross-examination.

(By Mr. WELSH.) [31]

There were other parties in this deal whose names I have not mentioned; I knew that all the time; this is the first time I have mentioned it; I did not tell the Government officials that there were other parties in this deal. I told a number of people around Centralia, before I went down to San Francisco, that I was going down there to buy a pipe-organ, and that was pretty generally understood around there. When I left San Francisco some was packed and some of it was not packed. I did not ship anything. The trunk and the shipment went together. Platt did the packing and filled the dry-cells with liquor. I did not have a thing to do with that. I did not see this box shipped, and do not know whether it was shipped all together or not. I could not say that I did see this box packed, nor I could not swear that it was the same box that was packed in San Francisco and shipped to Seattle, because I did not put my own mark on it to identify it. I do not know whether the dry-cells were full or empty when they left San Francisco.

Mr. WELSH.—We move to strike out all of the evidence about that box.

The COURT.—It having gone in without objection, the motion will be denied.

I did not bring any whiskey with me. I had three cases shipped from San Francisco; that was in addition to the dry-cells shipment, but I could not positively swear that they were ever shipped. I do not

(Testimony of Joe Lucas.)

know in my own knowledge that this box and its contents ever left San Francisco, or that these dry-cells were filled with whiskey. I did not fill any [32] dry-cells down there myself, nor had anything to do with filling them. I saw some of the dry-cells filled, but could not swear that these are the dry-cells I saw filled.

I first spoke to the defendant, Oess, about this transaction about three weeks before I went to San Francisco. I did not tell him at that time that I was going down to buy a pipe-organ, but did tell him that five or six days later. Oess paid me this money about a week before I left for San Francisco, and it was after my second conversation with him. Jerry Driscoll was present when Oess paid me the money. He paid me in currency. At that time I told him the names of the other parties who had contributed money to this enterprise. I gave him only part of the names. At the time Oess paid me the money, in the presence of Driscoll, I did not tell him anything about whiskey. At the time I took the money, nothing was mentioned about a pipe-organ. I told Mr. Oess that I was going to bring the whiskey back in a pipe-organ, and he did not know that I was going to bring it back in the manner in which I did, or that I ever brought it back that way.

I first talked to Bruce Richards about the matter three days after I talked to Oess. He brought the subject up. Oess was present at one time when I had a talk with Richards, prior to my going to San Francisco—probably a week after my first conversa-

(Testimony of Joe Lucas.)

tion. I am not sure whether we talked the matter over there or not. Bruce paid me $200.00 at first, and $40.00 afterwards, making $240.00 in all. The money was paid on the street, in cash. I told him that I was going to purchase a pipe-organ. **[33]**

Redirect Examination.

(By Mr. CONWAY.)

I told Oess that I was to load the whiskey in the large pipes of the pipe-organ, and he said it was a very clever stunt. He did not think it would ever be caught. I told Richards the same thing, and talked to Bill Toles about it. I am not sure that I told Symons.

Q. Did you explain to Oess, Richards and to Toles, that when you shipped the whiskey up in the pipes of the pipe-organ you were going to put the name of the consignee and the contents on the pipes?

Mr. WELSH.—That is leading and suggestive. We object to it.

The COURT.—Objection overruled.

Mr. WELSH.—We except.

A. I said nothing about labeling it, or anything; and I said nothing about as to who it would be consigned to; in fact, when I went down there, I did not know how I would do it.

**Testimony of Jack Platt, for Plaintiff.**

JACK PLATT, being sworn as a witness for plaintiff, testified as follows:

My name is Jack Platt; I know Joe Lucas; I made

(Testimony of Jack Platt.)

a trip with him from Centralia to San Francisco, the first part of February, 1919.

Q. Had you done anything preparatory to your trip to San Francisco?

Mr. WELSH.—Objected to as incompetent.

The COURT.—Overruled. [34]

Mr. WELSH.—Exception.

A. When I was down there I prepared some dry-cell batteries.

Mr. WELSH.—I ask that the answer be stricken as not responsive.

The COURT.—Motion denied.

Mr. WELSH.—Note an exception.

Q. Did you make any preparation in Centralia for the trip? A. Yes.

Q. What did you do?

Mr. WELSH.—We object to that as incompetent, irrelevant, and immaterial.

The COURT.—Overruled.

Mr. WELSH.—Exception.

A. Made some tops for them cans of the dry-cell batteries.

(Witness examines exhibits heretofore placed before jury, and testified:)

I recognize that as the same sort of thing that I prepared. We just put these brass pieces and this screw on and then poured it in with tar. I prepared 500 in Centralia, packed them in a suitcase, and took them down to San Francisco. Joe Lucas went with me. After I got in San Francisco, I made some more of these tops and then I packed these cans full of

(Testimony of Jack Platt.)

bottles and filled them up with whiskey. I recognize Exhibit 1.

That is the sort of contraption that I fixed up down in San Francisco.

Q. What did you fill those little bottles with? [35]

Mr. WELSH.—We object to that as incompetent, hearsay as far as the defendants are concerned.

The COURT.—Objection overruled.

Mr. WELSH.—Exception.

A. Filled them bottles with whiskey. There was 1,000 of them. I put them in cans, like Exhibit 1, and packed them in packing cases and nailed them up.

Exhibit 2 is the same packing-case they were packed in; 125 in a box; Exhibit 2 is similar to the packing that was done in San Francisco. There were eight of these boxes so packed. I did not buy the whiskey that went into those bottles. It was brought up to the house where I was packing the cases and I filled the bottles and packed the cases myself. I first saw that big trunk in Centralia; Mr. Lucas had it; I saw it in San Francisco; I had it there; I got it from the Railroad station; it was shipped by express to Mr. Johnson; I took it up to the house where I rented, on Webster Street; I opened it and took out what I needed and filled up these cans. After I got through with it, I put in three cases of bonded goods, whiskey.

Exhibit 5 for indentification is the bonded whiskey. It was Old Taylor and Sunnybrook in pint bottles.

(Testimony of Jack Platt.)

I recognize Exhibit No. 6 for identification as the same kind.

Mr. CONWAY.—I offer in evidence Exhibits 5 and 6.

Mr. WELSH.—Objected to, not identified.

The COURT.—Objection overruled. They will be admitted in evidence. [36]

Thereupon, said bottles of whiskey were marked as Government Exhibits 5 and 6.

Mr. WELSH.—Note an exception please.

After the packing was done in the trunk, I got a truck and had it taken to the Pacific Steamship Dock and shipped it by boat from San Francisco to Seattle in the name of H. Johnson, on the "Admiral Schley." I recognize this trunk as the one I shipped.

Thereupon, the trunk was offered and admitted in evidence, marked as Government's Exhibit 7.

I left San Francisco on the "Admiral Schley," the same boat I shipped the liquor on, about February 27th or 28th. The boat reached Seattle March 1st. I was arrested the first of March, in Seattle. I went to San Francisco at Mr. Lucas' suggestion. He had told me that he intended to ship up some whiskey.

Cross-examination.

(By Mr. WELSH.)

At the time I was arrested, the liquors were seized by the Government. I could not swear that the liquor introduced in evidence was the same liquor shipped. Of course, there are many bottles similar to that. I am pretty sure that these dry-cells were the same. I do not know of anybody else making

(Testimony of Jack Platt.)
any caps like that. I did not make the cans; I made the caps. Lots of batteries are just like these.

**Testimony of J. H. Boomer, for Plaintiff.**

J. H. BOOMER, being duly sworn as a witness for the plaintiff, testified as follows:

My name is J. H. Boomer; I live in Centralia; I know [37] · Joe Lucas, Bruce Richards, Mr. Symons, August Oess and Mr. Toles. In the latter part of January, or early part of February, 1919, I asked Mr. Lucas if he went to Frisco if he would slip me in some whiskey. He said he would, and I gave him a check for $50.00. I heard it talked among myself, Oess and Richards that he was going to ship a pipe-organ back.

Q. When was it?

A. After the stuff had been seized.

Q. After it had been seized? A. Yes, sir.

Mr. WELSH.—We move to strike that out.

The COURT.—Motion will be denied.

Mr. WELSH.—Exception.

Shortly after the liquor was seized in Seattle, I had a talk, in my store in Centralia, with Richards and Oess. They asked me if I had any money in the deal of getting liquor from San Francisco by Mr. Lucas. They told me that Mr. Lucas was trying to get away with this money, and would never ship the goods. I told them I would see Lucas. I went with them to Mr. Lucas. Oess told me that he had $400.00 in the scheme. Richards told me that he had $240.00 in the scheme. Oess and Richards claimed that

(Testimony of J. H. Boomer.)

Lucas shipped the stuff in batteries instead of the pipe-organ. They understood he was to ship it in quart bottles in this pipe-organ, and that is one thing they claimed that Lucas was defrauding us out of our money.

I was present with Oess and Richards in Lucas' apartment after that, when Richards said to Lucas: "We want our money or our whiskey." Lucas said he could not give them [38] the whiskey, because it was seized, and as far as the money, he didn't think he was entitled to lose it all after going to the expense of buying the whiskey; didn't think it was a fair deal for him to pay the money all back. We all agreed that it was fair and right to help Platt out, and Lucas paid us back the money we had given him, except that he took $50.00 out of Oess' money, $40.00 out of Richards,' and $5.00 out of mine; that was to employ some attorney for Platt.

Q. Did Lucas at that time say anything about what he was going to do in connection with a possible criminal prosecution?

Mr. WELSH.—We object to that as immaterial, hearsay, incompetent and irrelevant.

The COURT.—Objection overruled. That is part of the same conversation.

Mr. WELSH.—Exception. This is where three or four were present.

A. Not that I remember, no, sir.

Q. Was the question of criminal liability discussed at that time. A. It was.

Mrs. Lucas gave us all a good talking to. She said

(Testimony of J. H. Boomer.)

we were all as guilty as Joe was, and if we did not keep our mouths shut, we would all get into trouble. Mr. Richards said he would not go to jail for $5,000, and wanted to keep out of jail, and we all wanted to keep out of jail.

Later, Richards came into my store and said "I understand you made all those batteries in your back room and [39] furnished the batteries. I think you are just as guilty as Joe Lucas," and acted as though he wanted to fight, and that sort of thing. I never had any conversation with Oess afterwards. Some time after that I met Richards on the street and he said if Lucas and I would go ahead and defend ourselves, they would look out for themselves. He didn't mention any names, he just said "we."

Cross-examination.

(By Mr. WELSH.)

Mr. Richards came to my place of business at Centralia both before and after we were arrested. My business is electrical business, and we carry dry-cell batteries for sale. I don't remember of Richards ever coming in there and my taking him in the back room to show him anything. He claimed that Mr. Lucas had no business to ship liquor in the battery cans; it was supposed to be shipped in a pipe-organ, or in case lots; I do not know just how, and that is the only thing he did not like. I did not know how Lucas was going to ship the liquor, and, as far as I know, none of the other parties knew the manner or how it was to be shipped from San Francisco. [40]

**Testimony of George W. Berg, for Plaintiff.**

GEORGE W. BERG, a witness called by the Government, being duly sworn, testified as follows.

Direct Examination.

(By Mr. CONWAY.)

My name is George W. Berg. I have been an employee of the Department of Justice for nine years. I recognize Government's Exhibit 1. It is whiskey in these dry-cell battery containers, shipped from San Francisco on the "Admiral Schley." I first saw it the first of March, this year. On the 28th of February, I was advised, through Agent Orr of San Francisco, that the shipment was enroute, and would reach Seattle on the "Schley." Orr arrived here the day previous, and he and I, on the morning of March 1st, met the "Schley" at Pier D, Seattle, and when the shipment was unloaded, we seized it and opened one of the cases there; found it to contain these dry-cell batteries and whiskey in these bottles. There were eight cases. The Government's Exhibit 2 is one of the cases. There were eight of these boxes just like Government's Exhibit 2. They were billed to Johnson S. & E. Company of Seattle, which is a fictitious address. There is no such place. These red cans were packed in the cases. This box is packed in the same way; 125 of these cells in each case packed similar to that. Bottles of whiskey similar to Government's Exhibit 1 were in those cans. Most of the whiskey was destroyed that same evening, with

(Testimony of George W. Berg.)

the exception of the exhibits that were used in Platt's trial and this here.

I first saw Government's Exhibit 7, this big trunk, in the hold of the "Schley." When the trunk finally came up, it was empty, with the exception of a package of [41] these labels. The trunk had been broken open in the hold. Immediately on the trunk coming up, we went down in the hold of the boat and made an examination there and found practically all the whiskey that had been taken and hid in different places of the hold, probably fifty or sixty pint bottles. Government's Exhibit 5 is one of them.

Government's Exhibit 6 shown witness, and he testified that it is a pint of Sunnybrook whiskey; that he first saw it in the hold of the ship at the time.

Government's identification 8 shown witness, and he testified that is one of the labels; that was in the package in the trunk at the time it came up on dock.

Thereupon said label was received in evidence marked as Government's Exhibit 8.

I talked with Jack Platt. Mr. Orr arrested him. He had on his person the shipping receipt, the original bill of lading covering that shipment.

On motion of Mr. Welsh, attorney for defendant, the testimony of this witness as to who broke open the trunk, and the testimony that they hid the whiskey around various parts of the ship, was stricken out.

**Testimony of John Berry, for Plaintiff.**

JOHN BERRY, being duly sworn as a witness for the Government, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

My name is John Berry. I am sheriff of Lewis County, Washington. I know the defendants and Joe Lucas and J. H. Bloomer. I saw the defendant Mr. Richards about the 8th or 9th of last February, and about the 8th or 9th of last March. [42] That was in Centralia. He showed me a Seattle newspaper containing an account of the arrest of Jack Platt and the seizure of the dry-cell batteries in Seattle. He said he wanted me to find out who was behind Platt in the shipment of the dry-cell batteries. He said he was thinking of going to Vancouver to get a man to get this information for him, but he thought that perhaps I could get it for him. I told him I could get the information without going to Seattle. I told him that Lucas was the head man, and there were several others, and I mentioned his name as being one of them. He said, "Neither you nor the Government has anything on me," because he did not have any money in the deal himself. I do not remember of his saying that he had given or paid any money to Lucas. He said that Lucas had paid back the money to some of them, and he thought that he should have his money back, if he paid it back to others, or words to that effect. There was no amount of money mentioned.

(Testimony of John Berry.)

I do not remember whether anybody had been arrested in connection with this shipment at that time other than Platt. I know when the arrests were made. This conversation was prior to the arrest of these men here. I *should it* was about four days after the arrest of Platt before anyone else had been arrested. I re*mb*er nothing being said about a pipe-organ.

I told him it looked like the whole bunch were getting in bad, and he said, "As far as I am concerned, neither you nor the Government have anything on me because this money was a friend's money" that he was talking about he had given Lucas. [43]

Cross-examination.

(By Mr. WELSH.)

I was talking with Mr. Richards after the arrest of Jack Platt in Seattle. At that time, the newspaper had published the account of the liquor being seized in dry-cells. I have never talked with Oess, Mr. Symons or Mr. Toles on that subject either before or since the arrest of Platt. I had never talked with Lucas, Boomer or Platt. Richards is the only one of the defendants I ever talked with.

I had been working on the proposition for several days watching for these dry-cell batteries to come in. I did not know at that time there were other parties than the defendants implicated. In fact, there were more implicated in it than I thought there were at that time.

**Testimony of Miles McGrail, for Plaintiff.**

MILES McGRAIL, a witness called by the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

I am acquainted with the defendant Richards. I had a talk with him in the month of March last about the Joe Lucas whiskey shipment after the arrests were made, and he said he did not have a dollar of his own money in it, but the money he gave Lucas belonged to a woman. [44]

**Testimony of F. W. McIntosh, for Plaintiff.**

F. W. McINTOSH, a witness called by the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

I am a special agent for the Department of Justice of the *United.* I know the defendant Mr. Richards by sight. I had a talk with him on the 17th of March in the office of the county engineer of Lewis County at Chehalis, Washington. I recounted to him some of the things we had indicating his guilt in this matter, and advised him it would probably be the easiest way for him to handle the matter to state his part of it with entire truth and candor and let the Government take action accordingly. Mr. Richards was not inclined to talk very much, but I said to him, You gave Mr. Lucas money. You did not give it to him for nothing. He went down for whiskey,

(Testimony of F. W. McIntosh.)

therefore you must have been concerned in the whiskey shipment. Mr. Richards said he did give him money, but the money was not his. He said it was something over $200. I made the statement to Mr. Richards that they had a nice little combination there in Centralia, apparently bringing in liquor. Mr. Richards says, "Centralia and Chehalis, too."

Cross-examination.

(By Mr. WELSH.)

At the time I talked with Richards, he knew I was in the employment of the Government. Our agent, McCormick was present during the conversation. I took him into the engineer's office that we might have a private conversation. I do not know personally of anyone else down there that had been shipping any liquor. [45]

Redirect Examination.

(By Mr. CONWAY.)

Q. You say that you went to see Mr. Oess, but he was not inclined to talk. Will you tell the jury exactly what transpired and what was said when you saw Oess?

A. I talked with him along the same line that I did to Richards and told him that if he cared to make a frank statement of the facts, we would be glad to have him do so, and he said he was not ready to talk. He wanted to consult an attorney before he decided as to just whether he would make any statement or not, and that was the extent of the conversation.

Mr. WELSH.—We move to strike out the conver-

(Testimony of P. M. Clayward.)

sation he had with Oess on the ground that it is incompetent, irrelevant, and immaterial.

The COURT.—Motion denied.

Mr. WELSH.—Exception.

**Testimony of P. M. Clayward, for Plaintiff.**

P. M. CLAYWARD, a witness called by the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

I am the clerk of the freight department and in the accounting office of the Pacific Steamship Company. Here is the original manifest of the steamer "Admiral Schley," voyage No. 59.

Witness pointed out on the manifest a shipment to Johnson Electric Company of eight cases dry-cell batteries and one trunk samples, billed at San Francisco, February 26, 1919. It was on the "Admiral Schley," voyage 59. She left **[46]** San Francisco the 26th of February, 1919, and in the ordinary course would reach Seattle about March 1st. I did not see that shipment.

**Testimony of Mrs. Nellie Lucas, for Plaintiff.**

Mrs. NELLIE LUCAS, a witness called by the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

I am the wife of Joe Lucas; went with him to San Francisco from Centralia in the early part of last

(Testimony of Mrs. Nellie Lucas.)

February. I know Jack Platt. I was present at a meeting in our apartments in Centralia some time near the middle of March. There was present my husband, August Oess, Bruce Richards, and J. H. Boomer. Mr. Richards said, speaking to my husband, "Well, Joe, I would not care so much about this matter, only the money does not belong to me; I borrowed it from my friends and I cannot explain to them what became of it, and I ought to have it back to give them; it is not my own money." Mr. Oess stated the reason he wanted his money back was because he had mortgaged his truck to some lady for $400.00, and he expected to use the liquor to get back the money and pay his debts and straighten it all out. It was mentioned at that time that Mr. Richards had $240.00 of other people's money, and Mr. Oess had mortgaged his truck for $400.00, and he had to give all the money to Mr. Lucas for the liquor. Boomer's account was mentioned as $50.00. I told Mr. Lucas that I thought he had better pay the money back, and I said they were probably the only ones that knew it now, and if he would pay the money back, they would not say anything, and they agreed they would not say anything if Mr. Lucas would give the money back. **[47]** He wrote out a check for the full amount to each defendant. I says, "Somebody ought to do something for Mr. Platt," and Mr. Richards agreed, since they had gotten him into the trouble, they ought to get him out of it, if they possibly could, so they agreed, and he took out of Mr. Richard's check $40.00, Mr. Oess' check

(Testimony of Mrs. Nellie Lucas.)
$50.00, and Mr. Boomer's $5.00, and gave them checks, to Mr. Oess $350.00, Mr. Richards $200.00, and Mr. Boomer $45.00.

I recognize Government's Exhibits 3 and 4 as the checks given to Oess and Richards.

I told the gentlemen they were a band of crooks, and I thought they all ought to be in jail with Mr. Platt. Richards said, "I would not go to jail for $5,000.00; I would not go to jail for any amount of money, if I could keep out." I said, "There was only one way to keep from going to jail and that was to keep your mouth shut," and they agreed they would all keep still.

There was a later conversation in our apartment in Centralia. There was present Mr. Richards, Mr. Lucas, myself, and Mr. McCormick. We saw Mr. Richards come across the street and Mr. Lucas motioned to him and he came up to the apartment. As he came in, Mr. McCormick was talking to us, and he jumped behind the piano. Mr. Richards was excited and said, "They have got us all; they are going to arrest every one of us and take us to jail." Now, he says: "I will tell you what we are going to contend —we are going to contend that you were going to ship the booze in the pipe-organ and bonded liquor and we are going to contend that the booze came in at the Milwaukee Depot and we have already got our booze, and that you had already shipped it in." I said, "Yes, but if you tell that, [48] you will have to prove that you got the liquor and you will be just as guilty that way as any other. Mr. Lucas has de-

(Testimony of Mrs. Nellie Lucas.)

cided to give up and plead guilty and you had better do it, too." Richard said, "I am not guilty." I says, "You know you are guilty as he is," to which he answered, "I will tell you if I knew that I could get out of it with just a fine, I would plead guilty, but I wouldn't go to jail; I wouldn't go to jail; I wouldn't go to jail for $5,000, or all the money in the world; I would not spend one minute in jail." I said, "Well, they will get you anyway; now that somebody has told, they will get you anyway." He replied: "That old Boomer is the man who told the whole thing; he went over there and got drunk and told everything he knew, and in Mr. Sutter's presence." I said: "Well, you better protect yourself. Mr. Lucas is going to plead guilty; somebody has told and he has decided to go and plead guilty." I said, "Well, you're guilty, you know you are guilty." He said, "Yes, but the Government does not know it." He said they would contend that it was not their liquor that had come into Seattle; that their liquor had already gone into the Milwaukee Dock.

**Testimony of J. W. McCormick, for Plaintiff.**

J. W. McCORMICK, a witness called by the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

My name is J. W. McCormick. I was a special agent for the United States Government, in the Department of Justice, and made an investigation with respect to a shipment of liquor from San Francisco

(Testimony of J. W. McCormick.)

to Seattle that had been made by Jack Platt. [49]

First learned of the shipment through Sheriff Berry, March 7th, in the Marshal's office in Tacoma. I went to Centralia and was introduced to a man named Lucas; that is the defendant Lucas.

Q. Joe Lucas?

A. Exactly. Lucas and I talked about this matter then and he asked me if there was not some way that the thing could be fixed, and that he was in deeply and that he thought he had suffered enough, and I told him there was only one way in which the matter could be fixed and that was for him to make a clean breast of the whole thing and have everybody else connected with it to do the same thing, and I told him—

Mr. WELSH.—We object to what he told Lucas.

The COURT.—Overruled.

Mr. WELSH.—The different statements he got after going to Lucas would not bind these other defendants, they not being present, and it was after the consummation of the scheme, if there was any such scheme.

The COURT.—You will only consider what took place as affecting Lucas, but this charge being that of a conspiracy, it is possible for the jury to find one of the defendants now on trial as being guilty of a conspiracy with Lucas; that being true, anything that Lucas said even after the conspiracy, after the seizure, which I don't understand this to be—this is after the conspiracy?

Mr. WELSH.—Yes.

(Testimony of J. W. McCormick.)

The COURT.—Even after the seizure, what Lucas said became material by reason of that fact.

Mr. WELSH.—As I understand the rule, I think your Honor has [50] stated the rule in instructing the jury heretofore; after the end of the conspiracy, if there was a conspiracy, whether it was a success or not, anything said or done by any of the co-conspirators, if there was a conspiracy, is not admissible as against any of the other defendant.

The COURT.—That is true, but take a case like this: Say Lucas and John Smith were charged with having been in a conspiracy and you had John Smith in one room and Lucas in another and Lucas confessed to the conspiracy; after the transaction is over, Lucas confessed in one room and Smith in another, you might say that what Smith said did not affect Lucas and what Lucas said did not affect Smith, but the two taken together would come under another rule. The objection will be overruled.

Mr. WELSH.—We object to the question as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Mr. WELSH.—Exception. We may have an objection and exception to this line of testimony, as to anything that Lucas said.

The COURT.—The objection is overruled and exception allowed, and the jury will understand as I have stated to them in the other instances, where the statement was made after the seizure, you will consider it only as affecting Lucas, but it does take two men to make a conspiracy and if one man confesses

(Testimony of J. W. McCormick.)

he has been in a conspiracy you can consider that against him at least. Proceed.

A. Why, Lucas then asked me what we had on him, and I told him of the circumstance of going to the station and getting the information in regard to the tickets purchased, also the express receipt. He then asked me whether Platt had [51] *had* squealed or not. I forgot in my opening statement to say that before we went to Centralia I went to the County Jail here in Tacoma and interviewed Platt with Sheriff Berry and that Platt had not squealed; he refused to discuss the matter at all. His last statement to Sheriff Berry and me was to tell Joe Lucas that Jack Platt did not squeal.

Mr. WELSH.—We object to that as incompetent, hearsay.

The COURT.—That will be stricken and the jury instructed to disregard it.

A. Lucas asked me whether Platt had squealed or not and I told him he had not. He said, "Where did this information come from?" I then told him that Sheriff Berry had told me that Richards had approached Sheriff Berry, seeking to employ him as a detective to find out whether or not Lucas had double-crossed Richards. He said, "Oh, that's how it came out?" Yes, sir. Then Lucas agreed to go to his little apartment over the Grand Theater, or Liberty, I have forgotten which, and within a very short time after that made a statement implicating these three defendants.

Mr. WELSH.—We object to that as incompetent,

(Testimony of J. W. McCormick.)

irrelevant and immaterial, hearsay.

The COURT.—I will sustain the objection.

Q. Did you talk with any of the defendants on trial? A. Yes.

Q. Which of them did you talk with first?

A. Lucas.

Q. Of those on trial?

A. Oh, I beg your pardon. Richards.

Q. You may state who was present. [52]

A. The first conversation I had with Mr. Richards there was nobody but he and I present, opposite the Pastime Pool Hall in Centralia on the 10th or 11th of March, 1919.

Q. You may give the jury the substance of that conversation. A. I went into the—

Mr. WELSH.—Your Honor, I am going to make an objection and then I won't have to make it any more on this line of testimony. We move to strike out all the witness has testified to as to statements made by Lucas after the seizure of the liquor,—and that is the time he has testified to—for the reason that at that time if there was any conspiracy it was at an end, and any act or conversation or statement by Lucas would not bind any of the defendants, and in fact is not admissible as against them, and Lucas not being on trial, it is not admissible at all here.

The COURT.—It will be stricken out and the jury instructed to disregard it.

I talked with defendant Richards on the 10th or 11th of March, 1919, in Centralia. I told him I wanted to discuss the liquor shipment in which he

(Testimony of J. W. McCormick.)

was interested. He admitted [53] that he had paid in two hundred and fifty or forty dollars, and he related to me his having gone to Sheriff Berry with the proposition to have Berry investigate the shipment as to whether or not Lucas had actually shipped the whiskey. Mr. Richards said he had asked Lucas for the bonded goods, and he had reason to believe that Joe Lucas had double-crossed him, and he would spend $5,000 to see it through. He said he had gone to see John Berry and John Berry had declined and told him there was only one thing to do, and that was to look out for himself. He could not interest him in a case of that kind. I asked Richards if he had admitted giving his money to Lucas for the purpose of shipping bonded whiskey from San Francisco to Centralia, and had also stated that to John Berry, to go to the Dale Hotel in Centralia and make the same admission in the presence of myself and Agent McIntosh. He agreed to do so, but asked me if, before he went to the Dale Hotel with the purpose of making this admission, I would accompany him to Oess, and I agreed to. He introduced me to Oess, and in Mr. Richard's presence I told Mr. Oess who I was and why I was there. I told Oess that Mr. Richards had already admitted he had given $240.00 to Lucas for this purpose; that I understood that Oess had given $400.00, and Oess admitted that he had given $400.00. Jack Platt's name was not mentioned. I then suggested to Oess that he better likewise make an admission and clean the matter up, and

(Testimony of J. W. McCormick.)

he said he wanted to talk to his attorney. Richards then refused to go to the Dale Hotel.

Afterwards I had a conversation with Richards in Mr. Lucas' apartment, in Centralia. When Mr. Richards came up to the apartment, I went behind the piano. Richards came [54] in and said: "Joe, the Government man is here and knows the whole darn thing; he knows who gave the money, how many of us gave the money, and so on, and, Joe, if I had known there was more than four of us in the proposition I would not have gone into it." He did not mention the four. Mrs. Lucas said, "We have decided to make a clean breast of it, and said you are as guilty as he is, as the rest of us, and you should do the same thing." Richards says: "Well, yes, but the Government doesn't know that. I have just seen George Dysart and he advised me to keep quiet and not make a statement at all to anybody. This Government man wanted me to make a statement, but George wants me to contend that the whiskey seized in Seattle was not our whiskey, and I am going to do it." I followed Mr. Richards downstairs and told him I had overheard the whole conversation, and he denied it, and he also denied it before Mr. and Mrs. Lucas. After Mr. Richards' arrest in the engineer's office in Chehalis, in the presence of Mr. McIntosh, he admitted that he had given money to Lucas for the purpose of purchasing bonded whiskey in San Francisco to ship to Centralia.

I first saw Government's Exhibits 3 and 4 in the

(Testimony of J. W. McCormick.)

Farmers and Merchants Bank at Centralia, on or about March 12, 1919.

Cross-examination.

(By Mr. WELSH.)

I first talked with Bruce Richards after the liquor had been seized. I talked with him alone. That is the time he took me down to see Mr. Oess. There was a warrant issued for his arrest at that time, but I did not have it. I went down there for the purpose of endeavoring to get some admission [55] from the defendant Richards. My object was to get him to make some statement, that if necessary I could come here on the witness-stand and testify about it, and also that I might include it in my report to my superior. He did not state to me that he bought brandy from the defendant Lucas, but that Lucas had the liquor in Centralia, and he was to deliver it that same night to his house. He didn't make such statement at the time he asked me to go down and see Oess. At Oess' place and in his presence, he said he had given Lucas $240.00 for the purpose of purchasing whiskey bonded goods in San Francisco for delivery to him at Centralia. He made that statement in the presence of Oess.

I next saw him at Mr. and Mrs. Lucas' apartment at Grand Theater, Centralia. When I saw Richards coming, I hid, not for the purpose of decoying him into some statement, but so that if necessary I could come here and testify against him.

**Testimony of J. T. Secrist, for Plaintiff.**

J. T. SECRIST, a witness called by the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

I am deputy United States Marshal. I served a warrant on Bruce Richards. He talked something about being arrested, and asked me about a bond. He and Mr. McIntosh were doing some talking there, but I did not hear them. [56]

**Testimony of Ben H. Rhodes, for Plaintiff.**

BEN H. RHODES, a witness called by the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

I am president of the Farmers and Merchants' Bank at Centralia. Exhibits 3 and 4 have been paid. Endorsement on Exhibit 4, "Bruce Richards," is his handwriting.

**Testimony of Joe Lucas, for Plaintiff (Recalled).**

JOE LUCAS, being recalled as a witness for the Government, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

I heard Mr. McCormick's testimony about the occasion when he and Mr. Richards and myself and Mrs. Lucas were present in our apartment in Centralia. Mr. McCormick and Mr. Richards returned to the

(Testimony of Joe Lucas.)

apartment on that day. McCormick said, Didn't Richards tell you what McCormick testified to here? He said he didn't, or he says, "I wasn't up here at all." (Witness hesitated.) He says something about a trap. "You don't get me in no trap," and that was the last I heard of it.

**Testimony of Mrs. Lucas, for Plaintiff (Recalled).**

Mrs. LUCAS, being recalled, by the Government, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

Mr. McCormick and Mr. Richards returned to our apartment on the same day, and myself and husband, Mr. Richards and Mr. McCormick were in our apartment at Centralia. McCormick said, "Now, tell Mr. and Mrs. Lucas that you did not say that," [57] and he said that he did not say it, and that he had not been in the room and had not talked to us at all.

Government rests.

Whereupon Mr. Welsh, attorney for defendant Oess, moved for a nonsuit as to him for the reason,

First, because of the insufficiency of the evidence upon which to base any verdict against him, and,

Second, because there is fatal variance between the evidence and the indictment.

The COURT.—I will overrule the motion at this time.

Mr. WELSH.—And exception.

The COURT.—Exception.

(Testimony of Albert Smith.)

Mr. WELSH.—The same motion is made with respect to the defendant Richards.

The COURT.—Denied.

Mr. WELSH.—And exception.

The COURT.—Exception.

**Testimony of Albert Smith, for Defendants.**

ALBERT SMITH, a witness called by the defendants, being duly sworn, testified as follows:

Direct Examination.

(Mr. WELSH.)

I have resided in Centralia thirty years. I am bank cashier of First Guaranty Bank. I am acquainted with the defendants Richards and Oess. Their general reputation as law-abiding citizens in the community in which they live is good. They stand well in their community as loyal men. [58]

Cross-examination.

(By Mr. CONWAY.)

I have never discussed the reputation of the defendant Oess with anyone; have never heard it said in that community that he was a bootlegger; never heard that report. Never heard it said of the defendant Oess in that community that since the first of January, 1916, he was dealing in intoxicating liquors. Oess does business at my bank.

I never heard anyone discuss the reputation of Bruce Richards.

**Testimony of Dr. J. H. Dumont, for Defendants.**

Dr. J. H. DUMONT, a witness called by the defendants, being duly sworn, testified as follows:

Direct Examination.

(By Mr. WELSH.)

I live in Centralia. Am a physician and surgeon. Have known Richards 25 years and Oess ten or fifteen years. Their general reputation in their community as law abiding citizens is good.

Cross-examination.

(By Mr. CONWAY.)

I cannot say any particular person I ever heard discuss their reputation, but that is their general reputation. I am friendly with all of the defendants. Never heard of Oess dealing in intoxicating liquors in Centralia since the first of January, 1916. [59]

**Testimony of T. H. McCleary, for Defendants.**

T. H. McCLEARY, a witness called by the defendants, being duly sworn, testified as follows:

Direct Examination.

(By Mr. WELSH.)

I have resided in Centralia, Washington, 29 years. Have been postmaster for four years. Am acquainted with the defendants Oess and Richards. Their reputation as law-abiding citizens in the community in which they live is good.

(Testimony of T. H. McCleary.)

Cross-examination.

(By Mr. CONWAY.)

I never heard anything against Mr. Oess. Never heard anything in connection with liquor only since the indictment quite a few jokes have passed about the dry-cells. Never heard the character of Mr. Richards discuss with respect to intoxicating liquors. Never heard their character or reputation mentioned. Their reputation has been good prior to these accusations. My conclusion that their reputation is good is based on the fact that I never heard anything against them.

Q. Did you ever hear anything in connection with them or either of them with respect to the handling of intoxicating liquor?

Mr. WELSH.—We object to that as incompetent, irrelevant and immaterial.

The COURT.—You are confining this before the offense. Objection overruled.

Mr. WELSH.—Exception.

A. No, sir. I never heard that Oess dealt in intoxicating liquors after prohibition went into effect. **[60]**

**Testimony of Theodore Hoss, for Defendants.**

THEODORE HOSS, a witness called by the defendants, being duly sworn, testified as follows:

Direct Examination.

(By Mr. WELSH.)

Have lived in Centralia 35 years. Am in the cattle business, real estate and telephone business. Am ac-

(Testimony of Theodore Hoss.)

quainted with defendants Oess and Richards. Their general reputation in the community in which they live as law-abiding citizens is good.

Cross-examination.

(By Mr. CONWAY.)

I have *discuss* the question with a good many people in my lifetime in Centralia. Could name fifty of them with whom I have discussed their standing in the community. Have discussed the reputation of the defendants with respect to intoxicating liquors. Mr. Oess was in the saloon business before the State went prohibition. His reputation as a saloon man was extra good. He bore an extra good reputation, Have never heard anything about him in connection with intoxicating liquors since the State went dry.

I am familiar with Mr. Richards' reputation as to intoxicating liquors. I don't think he ever took a drink since I knew him. That is his reputation, anyway.

**Testimony of Dr. Thomas Primrose, for Defendants.**

Dr. THOMAS PRIMROSE, a witness called by defendants, being duly sworn, testified as follows:

Direct Examination.

(By Mr. WELSH.)

Resided in Centralia 18 years. Am a physician. Know Richards and Oess. Their general reputation as law-abiding [61] citizens, as far as I know, is good. Have never heard anything against any of them, nor their character assailed in any way.

(Testimony of Dr. Thomas Primrose.)

Cross-examination.

(By Mr. CONWAY.)

Have never heard their character as law-abiding citizens discussed. Am friendly with all the defendants.

**Testimony of August Oess, for Defendants.**

AUGUST OESS, one of the defendants, being duly sworn, testified as follows:

Direct Examination.

(By Mr. WELSH.)

Live in Centralia. Am acquainted with Joe Lucas. Am married man. Lucas told me that he was going to California to buy a pipe-organ, about the time I gave him the money in January, 1919. Jerry Driscol was present when I gave him the money in the lobby of the Liberty Theater. A few days before that he came to my place of business and wanted to know if I would let him have some money to buy a pipe-organ in California, for placing in the Liberty Theater. I told him I didn't have the money but I would see what I could do. In the next two or three days I met him and Mr. Driscol near the theater and I paid him $400 in the presence of Mr. Driscol, for a pipe-organ, not for any whiskey. He said he would get the organ and pay me as soon as he got back. He gave me a receipt, "I. O. U. $400," signed by Joe Lucas. He wrote that in the presence of Driscol. He paid me back $350, and he said he was not in a position to pay the balance back, but would pay it later. After he got back, I met him at the theater,

(Testimony of August Oess.)

[62] and he said, "There is nothing doing, I didn't buy any organ. I brought your money back to you. I had no business to spend your money for anything else. Your money is here for you. You can get it back in the morning." Mr. Richards was present at the time. Mrs. Lucas was not. He finally paid me $350, as shown by Exhibit 3. At the time he gave me the check, Mr. Boomer, Mr. and Mrs. Lucas and Mr. Richards were present. Then is where I learned of his trouble. He had paid these other men, and said he had two other men to take care of, his step-father and another man, Platt, that I did not know anything about. He made the same statement to Richards. Said he would pay me the balance later. I never had any conversation with him prior to the time he went to California about February 7, 1919, that he was going to California to purchase liquor and ship the same into the State of Washington. He never told me he was going to California to bring whiskey back in the pipes of the pipe-organ, or that he was going to bring any liquor back in any way. I just loaned him the $400 because he was a friend of mine. I have let him have money before, and he paid it back. We were friends.

I heard McCormick testify at the time he said that Mr. Richards and he went down to my place of business. We had a talk there. McCormick talked a very little; gave me his card and said, "I think the best thing for you is to admit the corn; it would be a whole lot easier on you." Of course I realized I was in a mix-up. I told him no more than that I

(Testimony of August Oess.)

had given Lucas the money. I did not tell him whether it was a loan or anything. Richards said he was giving Lucas some money for whiskey. Where he was to get it, I could not [63] say. I don't know. I could not say that any statement about California was made. He did not say that the whiskey was to be shipped from California. I did not say that I had a mortgage on my truck or auto, because I did not have.

I never had any conversation with Mr. Lucas where I agreed that I would transport the whiskey from Seattle or elsewhere in my truck to Centralia. Such a thing was never discussed. I did not know before Mr. Lucas went to California that he intended to ship any intoxicating liquor into the State of Washington. He was going to buy a pipe-organ. That is all I heard of it.

Cross-examination.

(By Mr. CONWAY.)

Joe Lucas in January and February of this year was doing a good business. He didn't seem to have money and he needed money to buy an organ. He has four theaters in Centralia. His credit was good everywhere. I heard Richards tell McCormick that he had given Lucas the money for whiskey. The amount was not mentioned. I did not know that the whiskey was to have been brought from California or San Francisco. I heard no mention of either California or San Francisco. I was standing right there listening. I was not concerned with Richard's trouble. I did not pay much attention to what Rich-

(Testimony of August Oess.)

ards had to say about the matter. I was surprised when Richards came down and brought the officer down. I understood that Richards came along just to show McCormick where I was. I wanted to tell McCormick that I had loaned the money to Joe Lucas, but he didn't give me any chance to. He said, "You boys may as well admit the corn"; that is all he said. I certainly did deny the corn. I denied that I was in the [64] whiskey proposition. Afterward at Chehalis in Westover's court, he asked me if I wanted to make a statement. I told him I did not think I wanted to now, as I had made other arrangements. I could not give Richards' exact language. He told me, just talking about this liquor that he was to get from Mr. Lucas. I don't know anything about California being mentioned at all. Richards said, "I gave Lucas $200," or 240, I forgot which, and he was to bring him back some brandy. "I don't feel I am guilty because he never brought me what he agreed to, but instead of bringing me brandy he got me mixed up into some other deal."

I don't remember anything having been said up at Lucas' room when Richards, Boomer and I were present about Jack Platt being in trouble, nor what Lucas said. The $50 he kept out of my $400 was not to pay Jack Platt. Nothing was said about that. Mrs. Lucas was there. I didn't hear any conversation about Richards being paid short. All Lucas said was, "Here's your money, boys; I cannot give you what is coming to you." I don't know anything about two sets of checks. Nothing was said about

(Testimony of August Oess.)

any such checks. Lucas said he didn't have money enough, and he kept this extra $50. He wanted to give Mr. Richards some, and he didn't have quite enough, and said he would give me the balance later on. Mrs. Lucas said, "You go ahead and give the boys a check." I told Mrs. Lucas she did not know the conditions of my making the loan. She said, "I know everything from start to finish," and I said, "Why, she didn't know only what Joe himself must have told her." He could not put me in that, because my money was only a loan.

I never told Lucas that I would tell the rest of the gang that I didn't get mine. I destroyed the receipt I got [65] from Lucas after he paid me the $350 back. He still owes me $50. I had the $350 four or five days, in fact, a week before the Federal officers came down. Lucas didn't tell me about Platt's arrest before he gave me the $350 check. He claimed that his stepfather in California was in trouble. He didn't say that it was anything connected with whiskey, and I did not suspect it was. McCormick was down to see me a week after I got the check; after I had destroyed the I. O. U.

I did not ask Jerry Driscol to testify that I had only paid Lucas $350 in the first place. The first I heard of Jack Platt was after McCormick was down there and gone. Mr. Richards told me about Platt; about Lucas having a man up here in jail, or something like that. That was after I had destroyed the I. O. U.

I heard Boomer's testimony. To my knowledge,

(Testimony of August Oess.)

it is false. I don't know anything like that being said or being done. My money was in there for that loan, and he told me he would take $50 out of that. Joe Lucas has always been my friend, as far as I know. I know he was acquainted with Bruce Richards.

Q. Now, I want you to explain to this jury why it is, or if you can explain why Joe Lucas should concoct the story that he has on you and Bruce Richards.

Mr. WELSH.—We object to that as not a fair question.

The COURT.—Overruled.

Mr. WELSH.—Exception.

A. Not any more than to protect himself, I guess, that is the only thing I can say, the only thing I can give any reason for; I never can give any reason for it in the world,—because what I told you is true just the same. [66]

Q. You think Joe is protecting himself?

A. I don't know, but that is the only answer that I could give; I do not know *why want* to get out of from it that way. I guess he did not have much chance to protect himself.

Q. What?

A. He did not have much chance to protect himself; he has already got his, I guess.

Mr. WELSH.—I move to strike out the answer, because the witness, the record of this Court shows that the indictment against him has been dismissed.

The COURT.—Motion denied.

Mr. WELSH.—Exception.

(Testimony of August Oess.)

I have known Boomer for a couple of years. As far as I know, have been friendly. Never had much to do with him. Know him, that is all.

Q. Can you explain why he is testifying as he did to-day against you? A. No, I don't.

Mr. WELSH.—We object to that question.

The COURT.—Overruled.

Mr. WELSH.—Exception.

Q. You cannot offer any explanation about that?

A. No, sir.

Q. Can you explain why Mrs. Lucas has testified as she has against you?

Mr. WELSH.—We object to that for the same reason, incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Mr. WELSH.—Exception.

A. No. [67]

**Testimony of Bruce Richards, for Defendants.**

BRUCE RICHARDS, one of the defendants, being duly sworn, testified as follows:

Direct Examination.

(By Mr. WELSH.)

I have lived in the State of Washington 26 or 28 years; in Centralia 22 years. Am engaged in the real estate business and handle cattle. I have been acquainted with Mr. Lucas six or seven years. I heard him testify. I had a conversation with him about whiskey the 5th or 6th of February of this year. I was standing in front of my store when Lucas came along. He was intoxicated. He

(Testimony of Bruce Richards.)

said, "Bruce, I have got 50 gallons. You can have all you want." I saw him the next day. I bought six cases of brandy of him. I wanted 3 Star Hennessey, and he didn't know just how much he had of that. He said he would let me have it at $40 a case. So I gave him $240 in cash. He *was bring* it down to me that night to my home in Centralia. He said he had it in Centralia. He never delivered the brandy or any part of it. I didn't know he was going to California to bring back liquor for me, and I never gave him any money for that. At the time, he was drinking pretty hard; I think for a couple weeks or three before that date. I next saw him two or three weeks after that. Three or four days after this conversation, I went to the theatre and inquired for him. After I made that inquiry I learned through Mr. Oess that he had gone to California to get a pipe-organ. I don't know just when he returned. When I first saw him after he returned, I asked him why he didn't bring my brandy, and he said, "I didn't have it." I told him I wanted my money, then he tells me he was in trouble, and at that time he went to the bank, I believe, and sent $500 to his stepdad. That didn't [68] sound good to me, and I thought I would see whether he was telling the truth or not, and I saw Sheriff Berry, and I had a paper stating some of the trouble that had happened. I asked the sheriff if he could give me the names of some shippers and receivers who would know about it. He said he could tell me all about it and told me considerable, and that Platt was the man that was ar-

(Testimony of Bruce Richards.)

rested. I told the sheriff that I was getting double-crossed, because I thought Lucas was drinking and blowing in my money. I didn't tell Berry that I had given Lucas money to bring whiskey or liquor from California. I told him I gave him money, and told other people I gave him $240. People would ask me how I came to get into the trouble about the dry-cells, and if they were friends, I would joke with them and tell them just how it was. I told Mr. McCormick I paid the $240 for brandy, and that it was to be delivered the night I gave the money.

When I took McCormick down to Oess' place of business he told me there was going to be a warrant for me over the Lucas scrap that you fellows were in, and I said, "What are we in on?" and he said, "There is one for a man named August Oess," and I told him, "I will go up with you." I went with him, and on the way, I told him if I had committed any crime, that was all the crime I had committed, that I gave $240 to bring me down some brandy that night, but he didn't do it, and I got my money all back but $40, and I expected to get that. I took him to the Oess place of business, and introduced him. I paid no attention to the talk. He asked me to go to the Dale Hotel with him. I didn't hesitate any. I was perfectly willing to go before these two men and make the same statement [69] I always made, and I never intended having an attorney until after I was arrested, and never did. I didn't talk to any attorney until after I was arrested. In Oess' presence, I told McCormick that I had given Lucas the $240 to

(Testimony of Bruce Richards.)

bring this brandy down to me that night. That is the only condition I gave the money to, and the only talk I had with him with reference to the whiskey. McCormick interviewed me three times. I never refused to talk to him.

I remember going up to Lucas' apartment when McCormick was there. Lucas beckoned me to come up. Lucas said to me, "Don't you think we ought to all go and plead guilty, and take a little fine, and get out and get this thing over with?" I said, "What do you mean, Joe?" He said, "That would be the easiest way anyway to get out of it if we can." I said, "I would not think about such a thing." Then I heard someone talking to Mrs. Lucas upstairs just outside the door, and I said, "That's McCormick." "No," Lucas said, "That is some fellow demonstrating a flying-machine, trying to sell shares," and I said, "Nothing doing; I would never plead guilty to something I wasn't in on." I went downstairs and got no more than five steps from the door until this man McCormick comes running after me and said, "Now, I am going to give you a chance to make a statement to save yourself." I said, "What do you mean?" He said, "Were you upstairs and told Lucas you would offer to plead guilty?" I said, "I didn't make any such statement." He said, "Will you walk up and see them?" We went upstairs. He opened the door, called Lucas, and he came up the stairs. McCormick stood between me and the door and said, "Didn't Richards say **[70]** so and so?" Lucas said, "Yes." I

(Testimony of Bruce Richards.)

made some remarks. I don't know what. I was angry. I said, "McCormick, you are just as dirty as he is." I went downstairs. It seems as if McCormick was trying to put words into my mouth. I never told McCormick that I had furnished money to Lucas to go to California and bring back any liquor. I had no conversation with Oess and Lucas in regard to the method in which the whiskey was to be brought to Centralia. I was never discussed. I never met Oess in Lucas' presence before he went to California. I never discussed it with him nor with Tole. Never met Tole with Lucas.

Cross-examination.

(By Mr. CONWAY.)

I did not want whiskey, but if I could not get brandy, I would take whiskey. I was not familiar with the bootlegging prices of Hennessey brandy in Centralia at this time. Joe Lucas' credit was good in Centralia. I considered all the time if I didn't get my whiskey or brandy, I would get my money. I thought he was double-crossing me because of the story he put up after he came back. He was to put in whiskey if he did not have enough for six cases. I was paying the same price for brandy as for whiskey. The price was to be $40 per case of twelve.

I could not tell the first or last time that I told anybody about having bought brandy from Lucas. I told McCormick and McIntosh. I don't know whether I told anything about the brandy on the occasion when Boomer, Lucas and Oess were in Lucas' apartments. I was there with Lucas. Oess,

(Testimony of Bruce Richards.)

Boomer, Lucas and myself were in Lucas apartments. Mrs. Lucas was there. I don't know whether the brandy transaction was mentioned when I was at Lucas' apartments and saw [71] McCormick. I don't know as I mentioned to Marshal McGrail about the brandy. If I talked with him at all, I did. I don't know whether I mentioned the brandy transaction to any of the witnesses who testified in this case. I did to McCormick, the Federal man, and to Oess. I never told Miles McGrail that neither the Government nor anybody had anything on me, because I had no individual interest in the transaction and the money I had given Lucas was not my own. I gave him $240 at one time. I never mentioned anything about a woman being interested in the transaction. I never told McGrail or McCormick or McIntosh or any other person that I paid the money for a woman. I may have said in the conversation at which Berry, McIntosh or McCormick was present, in which somebody asked me about the man for whom I was getting the liquor, that I didn't say it was a man. I might have said it in a joking way. I never said in the presence of Lucas on the occasion when Boomer and Oess were there, that we were going to contend that the liquor that we bought was delivered at the Milwaukee depot in Centralia. I never said in Lucas' apartment that I would run away if I thought I would have to go to jail; that I would not be convicted of this offense, or any offense in connection with the matter and go to jail, for $5,000. I may have said I was pretty near 60 years

(Testimony of Bruce Richards.)

old, and I never had had a key turned on me in my life and I never expected to. I never had bought any Hennessey brandy before this time when I bought it from Lucas since the State went dry. Lucas said he had the liquor in Centralia. I expected Sheriff Berry to find out whether Lucas' story was true or not. I was not worried about getting my money back. I did not expect Berry to help get my money **[72]** back or get the whiskey. I didn't believe Lucas' story. If he had been out of money and in trouble, I would have helped him if I could have believed his story, but I could not believe that; after seeing the paper, I was going to see McMaster, a detective of Portland and have him look up the matter, and find out whether he had sent this $500 to his stepdad. I didn't believe his story at the time he was telling it.

I have lived in the State thirty-odd years, and in Centralia since '97. Before that I was running section about three and a half years. During all the time I have been living in Washington I have been in the stock business, cattle business, quite a little, and I was chief of police during Mayor Galvin's administration. I like good horseraces and have played the horses a good deal. I have bought and sold property for about 10 or 12 years, and expect I have owned 10 or 12 hundred lots in Centralia and bought back and forth and built houses there and bought and sold them.

The reason I did not make a written statement to McCormick was that he did not find his man at the

(Testimony of Bruce Richards.)

hotel. I would have made the same statement I have made to-day or yesterday in writing. I never refused to make that kind of a statement in writing.

Redirect Examination.

(By Mr. WELSH.)

Mr. Lucas never told me at any time that Oess had contributed any money to him for the purpose of going to California and getting whiskey. I never talked to Mr. [73] Boomer about it. I never told Boomer that I had contributed money to Lucas to bring in liquor from California.

I never met Lucas and Oess at any time before Lucas went to California. [74]

Defendants rest.

**Testimony of H. K. O'Neill, for Plaintiff (In Rebuttal).**

H. K. O'NEILL, a witness called by the Government in rebuttal, being sworn, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

Lived in Tacoma a great many years. Prior to the first day of January, 1916, I was connected with the liquor business.

Q. Can you now testify as to what the price was on 3 Star Hennessey, by wholesale, per case, at that time?

Mr. WELSH.—I object to that as immaterial, improper rebuttal, irrelevant, because no matter what

(Testimony of H. K. O'Neill.)

the price was, it was not for sale on the market, had no marked price.

The COURT.—He is asking about prior to January, 1916. Objection overruled, but the jury will not only take into account the circumstances and what the market value was on this particular liquor at that time, but the various explanations given, that it was a conversation concerning 3 Star Hennessey. You may answer the question.

Mr. WELSH.—Exception.

A. Eighteen dollars a case.

Q. What was the price of bonded one-hundred proof whiskey at that time?

Mr. WELSH.—We object to that as immaterial.

The COURT.—Overruled.

Mr. WELSH.—Exception.

A. Well, it was all different prices according to the grade of the liquor. Sunnybrook was $8.00 or $9.00 a case of 12 quarts. Old Taylor was about $9.00. Old Crow $11.50. [75] Ordinary bonded whiskey was around these prices. 3 Star Hennessey Brandy is imported.

Thereupon, it was stipulated between the Government and the defendants that on May 12, 1919, on motion of F. R. Conway, Assistant United States District Attorney, in open court, a dismissal of this case was made as to J. H. Boomer and Joe Lucas.

**Testimony of Joe Lucas, for Plaintiff (Recalled in Rebuttal).**

JOE LUCAS, being recalled in rebuttal by the Government, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

It is not true that I was drunk one day and walked along the street and said to Richards, "Bruce, I have got 50 cases," as testified to by Richards. I didn't tell him at any time that I had 50 gallons of anything. I never agreed to deliver any brandy or any intoxicating liquors to Bruce Richards, anyway. Nothing was said between Richards and me the time he gave me the money for the 3 Star Hennessey, or any other time. I never told Richards at any time that I had any brandy. I had not been drinking when I made the statement to McCormick as to who was in the deal. I never gave August Oess an I. O. U. for the $400.00, or any written receipt of any kind. I don't know whether I told Oess the price of the organ I was going to get in California. I told him I was going to buy a pipe-organ; did not say anything about its being used, or as a special bargain or about mortgaging that organ, or getting money on it after I had brought it to Centralia; nor did I say anything about needing the money in order to consummate a **[76]** trade for the organ. I didn't ask Oess to loan me any money.

**Testimony of Mr. McGrail, for Plaintiff (In Rebuttal).**

Mr. McGRAIL, being called in rebuttal, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

Bruce Richards did not tell me in any conversation that he had ordered brandy from Joe Lucas and that it was to be delivered at his house, or that he had bought brandy or ordered brandy from Joe Lucas.

**Testimony of Mr. McIntosh, for Plaintiff (Recalled in Rebuttal).**

Mr. McINTOSH, being recalled in rebuttal for the Government, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

Q. Did the defendant Richards at any time say to you or in your presence that he had ordered or bought from Joe Lucas brandy?

Mr. WELSH.—We object to that as improper rebuttal, and for the further reason that Mr. Richards never said he made the statement to Mr. McIntosh.

The COURT.—I am not clear; objection overruled.

Mr. WELSH.—Exception.

**Testimony of John Berry, for Plaintiff (Recalled in Rebuttal).**

JOHN BERRY, being recalled in rebuttal by the Government, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

Q. Did Bruce Richards at any conversation had with you in [77] February or March of this year say that he had bought brandy from Joe Lucas?

Mr. WELSH.—We object to that as improper rebuttal, incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Mr. WELSH.—Exception.

A. No, sir, he did not.

Q. Did he at any time tell you about Joe Lucas having agreed to deliver him brandy?

Mr. WELSH.—Same objection.

The COURT.—Overruled.

Mr. WELSH.—Exception.

A. No, sir, he did not.

Q. Did he when he came to you exhibiting the newspaper seek to enlist your services in getting back the $240.00 from Lucas?

Mr. WELSH.—We object to that as improper rebuttal. He went all through that in the examination in chief.

The COURT.—Overruled.

Mr. WELSH.—Note an exception.

A. No, sir, that was not, as I understood, his purpose. Richards did not say anything to me at any

(Testimony of John Berry.)
time about wanting to find out whether Lucas had sent the $500.00 to somebody in California. That subject was never mentioned by him in this action, or transaction. You might say I have taken considerable interest in this matter on behalf of the Government. **[78]**

**Testimony of Mr. Boomer, for Plaintiff (Recalled in Rebuttal).**

Mr. BOOMER, being recalled in rebuttal by the Government, testified as follows:

Direct Examination.

(By Mr. CONWAY:)

At the time I was with Oess and Richards and Mr. and Mrs. Lucas, in Lucas' apartment, in Centralia, Oess did not say that he had loaned Lucas $400.00, and that he had no concern with the whiskey business, in my presence.

Q. Did Richards say, on that occasion, that he had bought brandy from Lucas?

Mr. WELSH.—We object to that as improper rebuttal.

The COURT.—Overruled.

Mr. WELSH.—Excepted.

A. No, sir. He did not say that the stuff he bought was to have been delivered by Lucas on the same day that he bought it. He did not say that he had nothing to do with the California liquor shipment.

Q. Did Richards come to your place of business?

A. Yes, sir.

Q. Did he say at that time and place that he

(Testimony of Mr. Boomer.)

thought Lucas was double-crossing him?

Mr. WELSH.—We object to that as improper rebuttal.

The COURT.—Overruled.

Mr. WELSH.—Exception.

A. He did.

Q. Did he say at that time anything about having bought brandy from Lucas?

Mr. WELSH.—We object to that as repetition.

The COURT.—Overruled.

Mr. WELSH.—Exception. [79]

A. No, sir; he did not. He did not say anything about Lucas having agreed to deliver brandy the same day on which the payment was made by Richards to Lucas; nor anything about where the delivery of that brandy or any other liquor was to be made.

### Testimony of Mr. McCormick, for Plaintiff (Recalled in Rebuttal).

Mr. McCORMICK, being recalled by the Government in rebuttal, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

Q. Did Richards tell you at any time that he had bought brandy from Joe Lucas?

Mr. WELSH.—Objected to as improper rebuttal.

The COURT.—Objection overruled.

Mr. WELSH.—Exception noted.

A. The word "brandy" was never used by either Richards or myself in any of our conversations. I

(Testimony of J. W. McCormick.)
first heard the word "brandy" mentioned in this connection, at this trial.

Q. Did Richards tell you that Lucas had agreed to make a delivery to Richards, or Richards' place of residence, of any intoxicating liquors on the same day or the next day after payment thereof was made by Richards to Lucas?

Mr. WELSH.—We object to that as improper rebuttal.

The COURT.—Overruled.

Mr. WELSH.—Exception noted.

A. He did not. At the time Richards and I went to Oess' place of business, in Centralia, Oess and Richards talked privately and out of my hearing. Oess did not state on that occassion that the money he had paid Lucas was a loan. [80]

Government rested.

Case closed.

Mr. Welsh, attorney for the defendant, then moved the Court to instruct the jury to find the defendant Oess "not guilty," for the following reasons:

First. Because the evidence is insufficient upon which to base a verdict of guilty against said defendant.

Second. Because there is a material and fatal variance between the indictment and the proof—

—which motion was denied by the Court, and exception allowed.

The same motion was then made by Mr. Welsh, attorney for the defendant, on behalf of the defend-

ant Bruce Richards, which was by the Court denied, and exception allowed.

Whereupon arguments were made to the jury upon behalf of the plaintiff and the defendants.

Whereupon the jury was duly instructed by the Court and retired to consider of their verdict, and later returned into court with the verdict finding the defendants Bruce Richards and August Oess guilty as charged.

United States of America,
Western District of Washington,
Southern Division.

I, E. E. Cushman, the undersigned Judge of the District Court of the United States, Ninth Judicial Circuit, Western District of Washington, Southern Division, before whom the above-entitled cause was tried, do hereby [81] certify that the matters and proceedings set forth in the foregoing bill of exceptions and statement of facts are all of the matters and proceedings which occurred on the trial of said cause, and the same are hereby made a part of the record therein.

I further certify that said bill of exceptions and statement of facts contains all the material facts and evidence introduced on the trial of said cause by and on behalf of the respective parties thereto, together with a statement of all motions, objections and rulings thereon, and exceptions taken thereto by the respective parties occurring in the trial of said cause, and the same are hereby made a part of the record in said cause, and that the exhibits introduced by the respective parties upon said trial will be filed here-

with and the clerk of this court is directed so to do.

Counsel for the respective parties hereto being present and concurring herein.

IN WITNESS WHEREOF, I have hereunto set my hand this 11th day of July, A. D. 1919, at Tacoma, in said District.

EDWARD E. CUSHMAN,
Judge. [82]

---

**Petition for Writ of Error.**

Bruce Richards and August Oess, defendants in the above-entitled cause, feeling themselves aggrieved by the judgment entered herein on the 9th day of June, 1919, each separately come now and petition this Court for an order allowing each of them to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the 9th Circuit under and according to the laws of the United States in that behalf made and provided, there to correct certain errors committed to the prejudice of each of said defendants, and which more in detail appear from the assignments of error filed with this petition; defendants each pray that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the 9th Circuit, for the correction of the error so complained of, and that the transcript of the record, proceedings and papers in this cause duly

authenticated may be sent to said United States Circuit Court of Appeals.

GEORGE DYSART,
CHARLES O. BATES,
CHARLES T. PETERSON,
Attorneys for Defendants Oess and Richards.

[83]

---

**Assignment of Errors.**

Come now Bruce Richards and August Oess, defendants, and each separately assign errors in the trial, decisions, rulings, orders and judgment of the Honorable District Court in said cause, as follows:

I.

The Honorable District Court erred in denying defendants' motion to strike out the evidence of the witness Joe Lucas in regard to a conversation between witness and Richards as to Richards pleading guilty to the charge. (Bill of Exceptions, page 6.)

II.

The Honorable District Court erred in refusing to sustain the objection to the following question put to the witness Joe Lucas:

> Q. "Did you explain to Oess, Richards and Toles, that when you shipped the whiskey up in the pipes of the pipe-organ you were going to put the name of the consignee and the contents on the pipes?"

for the reason that said question was leading and suggestive. (Bill of Exceptions, page 9.)

III.

The Honorable District Court erred in overruling

the objection of these defendants with the following question propounded to the witness Jack Platt:

Q. "Had you done anything preparatory to your trip to San Francisco?"

as the same is incompetent. (Bill of Exceptions, page 9.) [84]

IV.

The Honorable District Court erred in refusing to strike the answer made by the witness to said question, as the same was not responsive. (Bill of Exceptions, page 10.)

V.

The Honorable District Court erred in overruling defendants' objections to the following questions:

Q. "Did you make any preparation in Centralia for the trip?" A. "Yes."

Q. "What did you do?"

as the same was incompetent, irrelevant and immaterial. (Bill of Exceptions, page 10.)

VI.

The Honorable District Court erred in overruling the objection of defendants to the following question propounded to the witness Jack Platt:

Q. "What did you fill those little bottles with?"

for the reason that the same was incompetent and hearsay, as far as defendants are concerned. (Bill of Exceptions, page 11.)

VII.

The Honorable District Court erred in admitting in evidence, over the objections of these defendants, Exhibits 5 and 6, for the reason that they were not

identified. (Bill of Exceptions, page 11.)

VIII.

The Honorable District Court erred in refusing to strike out on motion of these defendants the testimony of the witness J. H. Boomer as to conversation between him and the defendants Oess and Richards after the liquors in this case had been seized, and as to the conversation witness had with Joe Lucas, not in the presence of these defendants. (Bill of Exceptions, pages 12 and 13.) [85]

IX.

The Honorable District Court erred in refusing to sustain the objection of the defendants to the following question propounded to witness J. H. Boomer:

> Q. "Did Lucas at that time say anything about what he was going to do in connection with the possible criminal prosecution?"

as immaterial, hearsay, incompetent and irrelevant. (Bill of Exception, page 14.)

X.

The Honorable District Court erred in refusing to strike out the evidence of the witness F. W. McIntosh as to the conversation he had with the defendant Oess, as follows:

> "I told Oess that if he cared to make a frank statement of the facts, we would be glad to have him do so, and he said he was not ready to talk. He wanted to consult an attorney before he decided as to just whether he would make any statement or not, and that was the extent of the conversation."

as incompetent, irrelevant and immaterial. (Bill of Exceptions, page 21.)

XI.

The Honorable District Court erred in overruling the objection of these defendants to the evidence of the witness McCormick, conversation taken place between him and Lucas not in the presence of these defendants. (Bill of Exceptions, pages 25 and 26.)

XII.

The Honorable District Court erred in denying the motion of the defendant Oess for a nonsuit as to him after the Government had rested: [86]

First, because of the insufficiency of the evidence upon which to base any verdict against him; and

Second, because there is a fatal variance between the evidence and the indictment. (Bill of Exceptions, page 31.)

XIII.

The Honorable District Court erred in denying a like motion for the defendant Richards.

XIV.

The Honorable District Court erred in overruling the objection of these defendants to the following question propounded to witness T. H. McCleary, on his cross-examination:

> Q. "Did you ever hear anything in connection with Oess or Richards with respect to the handling of intoxicating liquor?"

as incompetent, irrelevant and immaterial. (Bill of Exceptions, page 33.)

XV.

The Honorable District Court erred in overruling

the objection of these defendants to the following question asked the defendant Oess, on his cross-examination:

> Q. "Now, I want you to explain to this jury why it is, or if you can't explain, why Joe Lucas should concoct the story that he has on you and Bruce Richards."

as not a fair question. (Bill of Exceptions, page 39.)

XVI.

The Honorable District Court erred in refusing to strike out of the cross-examination of the defendant, Oess, in which he said Joe Lucas did not have much chance to protect himself; that he had gotten his already; for the reason that the record of this Court shows that the indictment against Joe Lucas had been dismissed. (Bill of Exceptions, page 40.) [87]

XVII.

The Honorable District Court erred in refusing to sustain the objection of these defendants to questions propounded the defendant Oess as to why Joe Lucas and Mrs. Joe Lucas had testified against him in this case, as incompetent, irrelevant and immaterial. (Bill of Exceptions, page 40.)

XVIII.

The Honorable District Court erred in allowing the defendant H. K. O'Neill to testify in rebuttal as to the price of 3 Star Hennessey Brandy, and as to the price of bonded one hundred proof whiskey, as immaterial, irrelevant and improper rebuttal. (Bill of Exceptions, page 48.)

XIX.

The Honorable District Court erred in refusing to sustain the objection to the following question asked the defendant McIntosh by the Government in rebuttal:

> Q. "Did the defendant Richards, at any time, say to you or in your presence that had ordered or bought, from Joe Lucas, brandy?"

for the reason that the same is improper rebuttal, and that the defendant Richards never said he made the statement to Mr. McIntosh. (Bill of Exceptions, page 50.)

XX.

The Honorable District Court erred in refusing to sustain the objection to the following question asked the witness John Berry by the Government in rebuttal:

> Q. "Did Bruce Richards, at any conversation had with you in February or March of this year, say that he had bought brandy from Joe Lucas?"

as improper rebuttal, incompetent, irrelevant, and immaterial. (Bill of Exceptions, pages 50 and 51.)
[88]

XXI.

The Honorable District Court erred in refusing to sustain the objection to the following question asked the witness John Berry by the Government on rebuttal:

> Q. "Did Richards at any time tell you about Joe Lucas having agreed to deliver him brandy?"

as improper rebuttal, incompetent, irrelevant and immaterial. (Bill of Exception, page 51.)

XXII.

The Honorable District Court erred in refusing to sustain the objection of these defendants to the following question asked the witness Berry by the Government on rebuttal:

> Q. "Did Richards, when he came to you exhibiting the newspaper, seek to enlist your services in getting back the $240.00 from Lucas?"

as improper rebuttal and as having gone through with in witness' examination in chief. (Bill of Exceptions, page 52.)

XXIII.

The Honorable District Court erred in refusing to sustain the objection of these defendants to the testimony offered by the Government's witness, Mr. McCormick, on rebuttal, as to what Richards told witness, if anything, about buying brandy from Joe Lucas, or about Lucas making delivery of intoxicating liquors on the same day or the next day after payment thereof to him at his place of residence, as improper rebuttal. (Bill of Exceptions, page 53.)

XXIV.

The Honorable District Court erred in denying the motion of the attorney for the defendant Oess to instruct the jury to find said defendant not guilty, for the following reasons. [89]

First, because the evidence is insufficient upon which to base a verdict of guilty against said defendant.

Second, because there is material and fatal vari-

ance between the indictment and the proof.

XXV.

The Honorable District Court erred in denying the same motion for the same reasons on behalf of the defendant Bruce Richards. (Bill of Exceptions, page 54).

XXVI.

The Honorable District Court erred in denying these defendants' motion for new trial and erred in holding that there was no variance between the allegations of the indictment and the proof.

GEORGE DYSART,
CHARLES O. BATES,
CHARLES T. PETERSON,
Attorneys for Defendants Richards and Oess.

Dated this 26th day of July, A. D. 1919. **[90]**

---

**Order Allowing Writ of Error.**

On this 28th day of July, A. D. 1919, comes the defendants, Richards and Oess, by their attorneys, and files herein and presents to this Court their petition praying for the allowance of a writ of error on assignments of error intended to be urged by them, and praying also that a transcript of record and proceedings, upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. That such other and further proceedings be had that may be proper in the premises, and it appearing to the Court that heretofore and on the 9th day of June, 1919, by an order of this Court duly entered, the

amount of supersedeas bonds to stay proceedings to be given by each defendant was fixed at $2,500.00, subject to approval by W. A. Westover, United States Commissioner for the Western District of Washington; and that, thereafter, on the 10th day of June, 1919, such bonds in said amount were duly filed in this court and were approved by the said United States Commissioner.

ON CONSIDERATION WHEREOF, the Court does hereby allow the writ of error prayed for, and it is further ordered that the said bonds of the said defendants in the sum of $2,500.00 so given and approved, as aforesaid, are each hereby approved by the Court and each shall operate as a supersedeas and cost bond and stay all proceedings pending the hearing on said proceedings in error in the United States Circuit Court of Appeals.

JEREMIAH NETERER,
Judge. **[91]**

---

**Writ of Error (Copy).**

UNITED STATES OF AMERICA.

The President of the United States of America, to the District Court of the United States, for the Western District of Washington, Southern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment before you, between the United States of America, plaintiff, and W. F. Toles, J. P. Symons, Bruce Richards and August Oess, defendants, a manifest error hath happened to

the damage of said defendants, Bruce Richards and August Oess, we being willing that such error, if any, hath happened, should be duly corrected, and full and speedy justice done to the plaintiff in error aforesaid, on this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the court-rooms of such court, in the city of San Francisco, State of California, together with this writ, so that you have the same at said place before the justices aforesaid on thirty days from the date of this writ. That the record and proceedings aforesaid being inspected, said Justices of said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 28th day of July, A. D. 1919.

[Seal of U. S. Dist. Court]

F. M. HARSHBERGER,

Clerk of the District Court of the United States, for the Western District of Washington, Southern Division.

By Ed M. Lakin,
Deputy Clerk.

The foregoing writ is hereby allowed this 28 day of July, A. D. 1919.

JEREMIAH NETERER,
Judge. **[92]**

**Citation on Writ of Error (Copy).**

UNITED STATES OF AMERICA,—ss.

The President of the United States to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to a Writ of Error duly issued and now on file in the office of the clerk of the United States District Court for the Western District of Washington, Southern Division, wherein Bruce Richards and August Oess are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why so much of the judgment rendered against the said plaintiff in error as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable E. D. WHITE, Chief Justice of the Supreme Court of the United States, this 28th day of July, A. D. 1919.

JEREMIAH NETERER,
United States District Judge. **[93]**

---

**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States

District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct transcript of the record and proceedings in the case of the United States of America, Plaintiff, versus W. F. Toles, J. P. Symons, Bruce Richards and August Oess, Defendants, No. 2728, in said District Court, as required by praecipe of counsel filed and shown herein and as the originals thereof appear on file and of record in my office in said District at Tacoma, and that the same constitutes my return on the annexed writ of error herein.

I further certify and return that I hereto attach and herewith transmit the original writ of error and the original citation on writ of error herein, together with acceptance of service thereon.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the plaintiffs in error for making the record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

| | |
|---|---|
| Clerk's fees (Sec. 828, R. S. U. S.) for making record and return, 235 folios at 15¢ each | $35.25 |
| Certificate of Clerk to Transcript, 3 folios at 15¢ each and seal | .65 |
| Clerk's fees for issuing Writ of Error, Citation, recording bonds, etc. | 16.45 |
| Total | $52.35 |

ATTEST my hand and the seal of said District

Court at Tacoma, in said District, this 20th day of August, A. D. 1919.

[Seal] F. M. HARSHBERGER,
Clerk.
By Ed M. Lakin,
Deputy Clerk.

---

*In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.*

No. ——.

BRUCE RICHARDS and AUGUST OESS,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Writ of Error (Original).**

United States of America.

The President of the United States of America, to the District Court of the United States for the Western District of Washington, Southern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment before you, between the United States of America, Plaintiff, and W. F. Toles, J. P. Symons, Bruce Richards and August Oess, Defendants, a manifest error hath happened to the damage of said defendants, Bruce Richards and August Oess, we being willing that such error, if any, hath happened, should be duly corrected, and

full and speedy justice done to the plaintiff in error aforesaid, on this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the court-rooms of such court, in the city of San Francisco, State of California, together with this writ, so that you have the same at said place before the justices aforesaid on thirty days from the date of this writ. That the record and proceedings aforesaid being inspected, said Justices of said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 28th day of July, A. D. 1919.

[Seal] F. M. HARSHBERGER,
Clerk of the District Court of the United States, for the Western District of Washington, Southern Division.

By Ed M. Lakin,
Deputy Clerk.

The foregoing writ is hereby allowed this 28 day of July, A. D. 1919.

JEREMIAH NETERER,
Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Judicial Circuit. Bruce Richards and August Oess, Plaintiffs in Error,

vs. United States of America, Defendant in Error. Writ of Error. Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 28, 1919. F. M. Harshberger, Clerk. By Alice Huggins, Deputy.

Copy received July 28, 1919.

F. R. CONWAY,
Assistant U. S. District Attorney.

---

*In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.*

No. ——.

BRUCE RICHARDS and AUGUST OESS,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Citation on Writ of Error (Original).**

United States of America,—ss.

The President of the United States to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to a Writ of Error duly issued and now on file in the office of the clerk of the United States District Court for the Western District of Washington, Southern Division,

wherein Bruce Richards and August Oess are plaintiffs in error and you are defendant in error, to show cause, if any there be, why so much of the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable E. D. WHITE, Chief Justice of the Supreme Court of the United States, this 28th day of July, A. D. 1919.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Judicial Circuit. Bruce Richards and August Oess, Plaintiffs in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 28, 1919. F. M. Harshberger, Clerk. Alice Huggins, Deputy.

Copy received July 28, 1919.

F. R. CONWAY,
Assistant U. S. District Attorney.

---

[Endorsed]: No. 3381. United States Circuit Court of Appeals for the Ninth Circuit. Bruce Richards and August Oess, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the

United States District Court of the Western District of Washington, Southern Division.

Filed August 23, 1919.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

# United States Circuit Court Of Appeals

FOR THE NINTH CIRCUIT

| | |
|---|---|
| BRUCE RICHARDS and AUGUST OESS, **Plaintiffs in Error,** vs THE UNITED STATES OF AMERICA, **Defendant in Error.** | **No. 3381** |

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

# BRIEF OF PLAINTIFF IN ERROR

BATES & PETERSON,
National Realty Bldg., Tacoma, Wash.
GEO. DYSART,
Centralia. Wash.
JOHN T. WELSH,
South Bend. Wash.
Attorneys for Plaintiffs in Error.

F. H. COLE PRINTING CO. CENTRALIA

# United States Circuit Court Of Appeals

FOR THE NINTH CIRCUIT

| | |
|---|---|
| BRUCE RICHARDS and AUGUST OESS, **Plaintiffs in Error,** vs THE UNITED STATES OF AMERICA, **Defendant in Error.** | No. 3381 |

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

# BRIEF OF PLAINTIFF IN ERROR

## STATEMENT OF THE CASE

In the case at bar, W. F. Toles, J. P. Symons, Bruce Richards, August Oess, Joe Lucas and J. H. Boomer were indicted and charged with conspiring among themselves to ship and caused to be shipped from the State of California into the State of Washington, certain packages of spirituous intoxicating liquor, whiskey, without such

package being so labeled on the outside covers thereof, as to plainly show the name of the consignee thereof, the nature of the contents thereof or the quantity contained therein.

Page 3 of Trans.

The Government dismissed the indictment against the defendants Joe Lucas and J. H. Boomer.

Page 79 of Trans.

The defendants, W. F. Toles, J. P. Symons, Bruce Richards and August Oess, each entered a plea of not guilty to this indictment.

Page 5 of Trans.

These four defendants were tried on said indictment before a jury and the jury rendered a verdict finding defendants Toles and Symons not guilty, and the defendants Bruce Richards and August Oess guilty. The two last named defendants filed a motion for a new trial, and the court denied the same; and sentenced each of the defendants Bruce Richards and August Oess to pay a fine of $500.00 and to serve sixty days in Lewis County jail.

Page 16 of Trans.

From this judgment and sentence defendants Richards and Oess have sued out a write of error and appealed to this court.

## ASSIGNMENT OF ERRORS

I.

The Honorable District Court erred in denying defendants' motion to strike out the evidence of the witness Joe Lucas in regard to a conversation between witness and Richards as to Richards pleading guilty to the charge.

II.

The Honorable District Court erred in refusing to sustain the objection to the following question put to the witness Joe Lucas:

Q. "Did you explain to Oess, Richards and Toles, that when you shipped the whiskey up in the pipes of the pipe organ you were going to put the name of the consignee and the contents on the pipe?"

for the reason that said question was leading and suggestive.

III.

The Honorable District Court erred in overruling the objection of the defendants with the following question propounded to the witness, Jack Platt:

Q. "Had you done anything preparatory

to your trip to San Francisco?"
as the same is incompetent.

IV.

The Honorable District Court erred in refusing to strike the answer made by the witness to said question, as the same was not responsive.

V.

The Honorable District Court erred in overruling defendants' objections to the following questions:

Q. "Did you make any preparation in Centralia for the trip?" Ans.: "Yes."

Q. "What did you do?"
as the same was incompetent, irrelevant and immaterial.

VI.

The Honorable District Court erred in overruling the objection of defendants to the following question propounded to the witness, Jack Platt:

Q. "What did you fill those little bottles with?"
for the reason that the same was incompetent and hearsay, as far as defendants are concerned.

VII.

The Honorable District Court erred in admitting in evidence, over the objections of these defendants, Exhibits 5 and 6, for the reason that they were not identified.

VIII.

The Honorable District Court erred in refusing to strike out on motion of these defendants the testimony of the witness, J. H. Boomer, as to conversation between him and the defendants Oess and Richards, after the liquors in this case had been seized, and as to the conversation witness had with Joe Lucas, not in the presence of these defendants.

IX.

The Honorable District Court erred in refusing to sustain the objection of the defendant to the following question propounded to witness J. H. Boomer:

Q. "Did Lucas at that time say anything about what he was going to do in connection with the possible criminal prosecution?"

as immaterial, hearsay, incsompetent and irrelevants.

X.

The Honorable District Court erred in refusing to strike out the evidence of the witness F. W. McIntosh as to the conversation he had with the defendant Oess, as follows:

"I told Oess that if he cared to make a frank statement of the facts, we would be glad to have him do so, and he said wes not ready to talk. He wanted to consult an attorney before he decided as to just whether he would make any statement or not, and that was the extent of the conversation."

as incompetent, irrelevant and immaterial.

XI.

him do so and he said he was not ready to talk. He

The Honorable District Court erred in overevidence of the witness McCormick, conversation taken place between him and Lucas not in the presence of these defendants.

XII.

Th Honorable District Court erred in denying the motion of the defendant Oess for a non-suit as to him after the Government had rested:

First, because of the insufficiency of the

evidence upon which to base any verdict against him; and

Second, because there is a fatal variance between the evidence and the indictment.

XIII.

The Honorable District Court erred in denying a like motion for the defendant Richards.

XIV.

The Honorabl eDistrict Court erred in overruling the objection of these defendants to the following question propounded to witness T. H. McCleary, on his cross-examination:

Q. "Did you ever hear anything in connection with Oess or Richards with respect to the handling of intoxicating liquor?"

as incompetent, irrelevant and immaterial.

XV.

The Honorable District Court erred in overruling the objection of these defendants to the following question asked the defendant Oess, on his cross-examination:

Q. "Now, I want you to explain to this jury why it is, or if you can't explain, why Joe Lucas should concoct the story that he has on you and Bruce Richards?"

as not a fair question.

XVI.

The Honorable District Court erred in refusing to strike out of the cross-examination of the defendant, Oess, in which he said Joe Lucas did not have much chance to protect himself; that he had gotten his already; for the reason that the record of this Court shows that the indictment against Joe Lucas had been dismissed.

XVII.

The Honorable District Court erred in refusing to sustain the objection of these defendants to questions propounded the defendant Oess as to why Joe Lucas and Mrs. Joe Lucas had testified against him in this case, as incompetent, irrelevant and immaterial.

XVIII.

The Honorable District Court erred in allowing the defendant H. K. O'Neill to testify in rebuttal as to the price of 3-Star Hennessey Brandy and as to the price of bonded one hundred proof whiskey, as immaterial, irrelevant and improper rebuttal.

XIX.

The Honorable District Court erred in refusing to sustain the objection to the following question asked the defendant McIntosh by the government in rebuttal:

Q. "Did the defendant Richards, at any time, say to you, or in your presence, that he had ordered or bought, from Joe Lucas, brandy?"

for the reason that the same is improper rebuttal, and that the defendant Richards never said he made the statement to Mr. McIntosh.

XX.

The Honorable District Court erred in refusing to sustain the objection to the following question asked the witness John Berry, by the Government in rebuttal:

Q. "Did Bruce Richards, at any conversation had with you in February or March of this year, say that he had bought brandy from Joe Lucas?"

as improper rebuttal, incompetent, irrelevant and immaterial.

XXI.

The Honorable District Court erred in re-

fusing to sustain the objection to the following question asked the witness John Berry, by the Government on rebuttal:

Q. "Did Richards at any time tell you about Joe Lucas having agreed to deliver him brandy?" as improper rebuttal, incompetent, irrelevant and immaterial.

XXII.

The Honorable District Court erred in refusing to sustain the objection of these defendants to the following question asked the witness Berry by the Government in rebuttal:

Q. "Did Richards, when he came to you exhibiting the newspaper, seek to enlist your services in getting back the $240.00 from Lucas?" as improper rebuttal and as having gone through with in witness' examination in chief.

XXIII.

The Honorable District Court erred in refusing to sustain the objection of these defendants to the testimony offered by the Government's witness, Mr. McCormick, on rebuttal, as to what Richards told witness, if anything, about buying brandy from Joe Lucas, or about Lucas making delivery of intoxicating liquors on the same day or the next day after payment thereof to him at his place of residence, as improper re-

buttal.

XXIV.

The Honorable District Court erred in denying the motion of the attorney for the defendant Oess to instruct the jury to find said defendant not guilty, for the following reasons:

First, because the evidence is insufficient upon which to base a verdict of guilty against said defendant; and

Second, because there is material and fatal variance between the indictment and the proof.

XXV.

The Honorable District Court erred in denying the same motion for the same reasons on behalf of the defendant Bruce Richards.

XXVI.

The Honorable District Court erred in denying these defendants' motions for new trial, and erred in holding that there was no variance between the allegations of the indictment and the proof.

For Assignments of Error, see P. 88 to 95, Trans.

## ARGUMENT

### Assignments of Error Nos. 12, 13, 14, 25, and 26

FIRST

Directing our argument to assignments of error Nos. 12, 13, 24, 25 and 26, we have this to say: There was and is a fatal variance between the indictment and the proof. The indictment charges a conspiracy between the plaintiffs in error to ship whiskey from the State of California into the State of Washington, without so labeling the whiskey, and without showing the name of the consignee, and without specifying the quantity thereof.

The evidence upon which the defendants was convicted, all centered around the defendant Joe Lucas, against whom the Government dismissed the indictment. Lucas was the principal character in the tragedy. He was the one, who was to go to California and purchase and ship the whiskey into the State of Washington.

His evidence was necessary to a conviction, because he is the person to whom the money was paid and the only person who talked with any of the other defendants, and was the only person known to any of the other defendants. In fact,

Lucas went to each defendant personally and alone, and no defendant knew anyone else in the matter, excepting defendant Joe Lucas. This is Lucas' testimony and is the theory of the Government. Lucas did not inform any of the defendants as the manner in which he was to bring or transport the liquor into the State of Washington.

See his testimony P. 34-35 Trans.

In fact, when he went to California he did not know in what manner he would ship or bring the liquor into this state.

He testified as follows: "I said nothing about labeling it, or anything; I said nothing about as to whom it would be consigned; in fact( when I went down there, I do not know how I would do it."

P. 35 Trans.

The evidence does not disclose nor show that the plaintiffs in error ever entered into a conspiracy to have Lucas ship liquor or anything else into the State of Washington to a ficticious consignee, nor by a false label. The evidence, if it proves any crime at all, or any conspiracy whatever, which we deny, only proves that a conspiracy was entered into, to violate the Reed Act,

viz: to transport liquor into the State of Washington. Neither the indictment nor any of the allegations thereof is sufficient upon which to base any conspiracy under the Reed Act. . In other words, the indictment does not allege any conspiracy to violate the Reed Act, and does not allege that the State of Washington was dry territory at the time of the alleged conspiracy, nor at any other time. The indictment does not charge nor allege that it was or is contrary to the laws of the State of Washington to transport intoxicating liquors into the State of Washington. Therefore, the Reed Act is not shown to have been violated. We submit:

(a) That the evidence is not sufficient upon which to base a verdict of guilty against either of the plaintiffs in error.

(b) That there is a material and fatal variance between the evidence and proofs and the indictment filed in this action, and upon which the two defendants were, and each of them, was tried and convicted. The plaintiffs in error were charged with one specific offense and tried for and convicted of another crime. Therefore, assignments of error Nos. 12, 13, 24, 25 and 26 are and each is well taken.

Rabens vs United States, 146 Fed. Rep. 978, 77, C. C. A., 224.

Com. vs Harley, 48 Mass., 506.

Com. vs Kellogg, 61 Mass., 473.

Lowell vs People, 82 N. E. Rep., 226 (Ill)

In Rabers vs U. S. supra, the Court said:

"The count upon which plaintiff in error was indicted is clear and specific and leaves no doubt as to the offense charged, to-wit: A conspiracy to rob the post office at Latta. There is no allegation in the count which can in any way be construed to mean a general conspiracy to rob. The district attorney could undoubtedly have charged a general conspiracy. However, he did not see fit to do so, but elected to rely upon the specific charge of a conspiracy to rob the post office at Latta. Therefore, evidence tending to show a general conspiracy was incompetent and should have been rejected by the Court. The Government having relied upon a count charging a conspiracy which is restricted to one transaction, it was incumbent that it should satisfy the jury beyond a reasonable doubt that the plaintiff in error entered into a conspiracy with intent to rob the post office at Latta, as alleged. The case of Com. vs Harley, 7 Metc. (Msas.) 506, is on all fours with the case at bar * * .. * * * A careful inspection of the record leads to the conclusion that the introduction of evidence by the Government tending to show a general conspiracy, without

shewing that the defendant had knowledge that the post office at Latta was contemplated by the conspirators was prejudicial to plaintiff in error and no doubt resulted in his conviction."

What the Circuit Court of Appeals said in that case is very applicable to this case, in this:

There is evidence tending to show that the self-confessed conspirator, Joe Lucas, talked with plaintiffs in error before he went to California, and that he, Lucas, intended to ship intoxicating liquors into the State of Washington, but as he testified, he did not know in what manner he would transport the same, when he went to San Francisco.

P. 35, Trans.

He might have brought in by truck or automobile, or other method himself, without billing it to a ficticious consignee, and without shipping it to any consignee. Therefore, when, where and how did the plaintiffs in error, enter into a conspiracy with Lucas to ship liquor to a ficticious consignee, in the State of Washington, when Lucas testified that when he left the State of Washington for San Francisco, he did not know how he would get the liquor into the State of Washington. Yet the plaintiffs in error were convicted of having entered into a conspiracy to

ship intoxicating liquor to a ficticious consignee, and without disclosing the kind or character of the shipment, when the evidence only tends to show that plaintiffs in error were to receive intoxicating liquor from Joe Lucas in the State of Washington.

Surely there is a fatal variance between the indictment and proof in this case. There are no common law offenses against the United States, U. S. vs Hudson, 1 Cranch 32; United States vs Coolidge, 1 Wheat. 415. Besides, it is an elementary proposition of law that an indictment must be proved as laid, and that the indictment may not allege one offense, and the proof establish another. The drag net system does not have any standing in a Federal Court. In all sincerity, we submit that the evidence is not sufficient to convict plaintiffs in error of the crime alleged against them by the indictment.

To illustrate, a charge of conspiracy to prosecute G. who was not guilty of the crime, the state may not prove that defendants conspired to or did prosecute other parties, who were guilty and with whom G. had no connection. Such proof could only create prejudice. The prosecution of guilty persons is not proof of a conspiracy to prosecute the innocent.

State vs Walker, 32 Main 195.

SECOND

Considering assignments of error 8 and 9, we contend that each is well taken, and because the Court did not sustain the contentions and objections of defendants the Court committed error highly prejudicial to plaintiffs in error.

If there was any conspiracy as alleged in the indictment, the same had come to an end, and a successful end, on March 1st, 1919; for on that date the intoxicating liquor reached Seattle, Washington, on the Steamer "Admiral Schley," and was unloaded from said steamer on March 1st, 1919.

See testimony of George W. Berg, a Federal Officer and an employee of the Department of Justice, page 42 of Trans., wherein he testified:

"Mr. Orr arrived here and he and I on the morning of March 1st met the Steamer "Schley" at Pier D, Seattle, and when the shipment was unloaded, we seized it, and opened one of the cases and there found it to contain these dry cell batteries and whiskey in these bottles. There were eight cases. They were billed to Johnson, S. & E. Co., Seattle, which is a ficticious address."

Page 42 of Trans. See also testimony of Jack Platt, page 38 of Trans., where he testified:

"I left San Francisco on the 'Admiral Schley' the same boat I shipped the liquor on, about Feb. 27 or 28. The boat reached Seattle March 1st. I was arrested the first of March in Seattle. I went to San Francisco at Mr. Lucas' suggestion. He had told me that he intended to ship up some whiskey. At the time I was arrested, the liquors were seized by the Government." Page 38 of Trans.

The law is:

The act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. But only these acts and declarations are admissable under this rule, which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, whether by success or failure, the admissions of one conspirator by way of narrative of past facts, are not admissable in evidence against the others.

Logan vs United States, 144 U. S. 263, 36 L. ed. 429.

Brown vs United States, 150 U. S. 93, 98, 37 L. ed. 1010.

Sparf vs United States, 156 U. S., 56, 39 L. ed. 345.

In Logan vs U. S., supra, the Court said:

"The Court went too far in admitting testimony on the general question of conspiracy.

"Doubtless in all cases of conspiracy, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. United States vs Gooding, 25 U. S. 12 Wheat. 460, 469, (6: 693, 696). But only those acts and declarations are admissable under this rule, which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, whether by success or by failure, the admissions of one consporator, by way of narrative of past facts, are not admissable in evidence against the others. 1 Greenl. Ev. Par. 111; 3 Greenl. Ev. Par, 94; State vs Dean, 35 N. C. 63; Patton vs State, 6 Ohio St. 467; State vs Thibeau, 30 Vt. 100; State vs Larkin, 49 N. H. 39; Heine vs Com. 91 Pa. 145; Davis vs State 9 Tex. App. 363.

'Tested by this rule, it is quite clear that the defendants on trial could not be affected by the admissions made by others of the alleged conspirators after the conspiracy had ended by the attack on the prisoners, the killing of two of them, and the dispersion of the mob. There is no evidence in the record tending to show that the conspiracy continued after that time. Even if,

as suggested by the counsel for the United States the conspiracy included an attempt to manufacture evidence to shield Logan, Johnson's subsequent declarations that Logan acted with the mob at the fight at Dry Creek were not in execution or furtherance of the conspiracy, but were mere narratives of a past fact. And the statement to the same effect, made by Charles Marlow to his companions while returning to the Denson Farm after the fight was over, were incompetent in any view of the case."

"Tested by the rule laid down in these cases, the acts and declarations of Mrs. Hitchcock, on the morning after the killing, were not competent evidence against the plaintiff in error, of the existence of any conspiracy on his part, to kill her husband, or to resist the arrest of Hampton, or to commit any other unlawful act, such as the Court instructed the jury would render him responsible for the acts done by his associates while engaged in a criminal enterprise. If a conspiracy was sought to be established effecting the plaintiff in error, it would have to be by testimony introduced in the regular way, so as to give the accused the opportunity to cross-examine the witness or witnesses. It could not be established by acts or statements of others directly admitting such a conspiracy, or by any statement of theirs from which it might be inferred."

In Brown vs U. S., supra, the Court said:

"The Court improperly admitted the testimony, as to what Mrs .Hitchcock said after the killing, as evidence tending to establish a conspiracy between the plaintiff in error and herself and others to kill her husband. It was furthermore objectionable because there was no evidence in the case tending to show that the defendant, or his alleged co-conspirators killed either of the deceased under the mistaken supposition that either one of them was Hitchcock. In the admission of the statements and declarations of Mrs. Hitchcock the Court assumed that the acts and declarations of one co-conspirator, after the completion or abandonment of a criminal enterprise, constituted proof against the defendant of the existence of the conspiracy. This is not a sound proposition of law.

"In Logan vs United States, 144 U. S. 263, 309 (36: 429, 445), Mr. Justice Grey speaking for the Court said: 'The Court went too far in admitting testimony on the general question of conspiracy. Doubtless in all cases of conspiracy, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. United States vs Gooding, 25 U. S. 12 Wheat. 469 (6: 696). But only those

acts and declarations are admissable under this rule which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, whether by success or failure, the admissions of one conspirator by way of narrative of past facts, are not admissable in evidence against the other. 1 Greenl. Ev. Par 111; 3 Greenl. Ev. Par. 94; State vs Dean, 35 N. C. 63; Patton vs State, 6 Ohio, St. 467; State vs Thibeau, 30 Vt. 100; State vs Larkin, 49 N. H. 39, 6 Aam. Rep, 456; Heine vs Com. 91 Pa. 145; Davis vs State, 9 Tex. App. 363. The same proposition is stated in the following authorities: People vs Davis, 56 N. Y. 103; New York Guaranty & Indemnity Co. vs. Gleason 78 N. Y. 504; People vs McQuade, 1 L. R. A. 273, 110 N. Y. 307; also Wharton, Crim. Ev. (9th ed.) Par. 699.

We will now apply the facts to the law to determine whether or not the assignments of error Nos. 8 and 9 are well taken.

J. W .McCormick was a special agent of the United States, and when on the witness stand, testifying in behalf of the United States, the follow proceedings occurred:

He testified: Interrogated by Mr. Conway, attorney for the Government. "First I learned of the shipment through Sheriff Berry, March

7th, in the marshall's office in Tacoma. I went to Centralia and was introduced to a man named Lucas, that is deefndant Lucas.

Ques. Joe Lucas?

A. Exactly. Lucas and I talked about this matter then and he asked me if there was not some way that the thing could be fixed and that he was in deeply and that he thought that he had suffered enough, and I told him that there was only one way in which the matter could be fixed and that was for him to make a clean breast of the whole thing and have everybody else connected with it to do the same thing, and I told him—

Mr. Welsh, attorney for plaintiff in error:

We object to what he told Lucas.

The Court: Overruled.

Mr. Welsh: The different statements he got after going to Lucas would not bind these other defendants, they not being present, and it was after the consummation of the scheme, if there was any such scheme.

The Court: Overruled.

Mr. Welsh: The different statements he got after going to Lucas, would not bind these other defendants, they not being present, and it was after the consummation of the scheme.

The Court: You will consider what took place as affecting Lucas, but this charge being that of conspiracy, it is possible for the jury to find one of the defendants now on trial as being guilty of a conspiracy with Lucas; that being true, anything that Lucas said, even after the conspiracy, after the seizure, which I do not understand this to be—this is after the conspiracy?

Mr. Welsh: Yes.

The Court: Even after the seizure, what Lucas said became material by reason of that fact.

Mr. Welsh: As I understand the rule, I think your honor has stated the rule, in instructing the jury heretofore; after the end of the conspiracy, if there was a conspiracy, whether it was a success or not, anything said or done by any of the co-conspirators, if there was a conspiracy, is not admissable as against any of the other defendants.

The Court: That is true, but take a case like this: Say Lucas and John Smith were charged with having been in a conspiracy, and you had John Smith in one room and Lucas in another, and Lucas confessed to the conspiracy, after the transaction is over, Lucas confessed in one room, and Smith in another, you might say that what Smith said did not affect Lucas and

what Lucas said did not affect Smith, but the two taken togther would come under another rule.

Mr. Welsh: We object to the question as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Welsh: Exception. We may have an objection and exception to this line of testimony, as to anything that Lucas said.

The Court: The objection is overruled and exception allowed, and the jury will understand as I have stated to them in the other instance, where the statement was made after the seizure, you will consider it only as affecting Lucas, but it does take two men to make a conspiracy. If one man confessed he has been in a conspiracy you can consider that against him, at least. (P. 51-54 of Trans.)

J. H. Boomer, a defendant, but against whom the Government dismissed the indictment, page ..... of Trans., was a witness for the United States, testified as follows: (By Mr. Conway)

"In the latter part of January or the early part of February, I asked Lucas if he went to Frisco if he would ship me in some whiskey. He said he would and I gave him a check for $50.00. I heard it talked among myself, Oess and Rich-

ards that he was going to ship a pipe organ back."

Ques.: When was it?
Ans. After the stuff had been seized.
Ques. After it had been seized?
Ans. Yes, sir.
Mr. Welsh: We move to strike that out.
The Court: Motion will be denied.
Mr. Welsh: Exception.

Page 39 of Trans.

It will be remembered that the indictment against Lucas and Boomer had been dismissed before the commencement of the trial. The record on this point is as follows:

"It is stipulated between the Government and the defendants that on May 12, 1919, on motion of F. R. Conway, Assistant United States District Attorney, in open court, a dismissal of this case was made as to J. H. Bomer and Joe Lucas."

Page 79 of Trans.

We earnestly insist that the ruling of the trial Court was manifest and prejudicial error. As we construe the doctrine enunciated by the Supreme Court of the United States in the three cases above cited, it appears to us that the evidence of witness Boomer and of witness McCor-

mick as to declarations made to them by Lucas, long after the intoxicating liquor was shipped into the State of Washington and seized by the Government, was inadmissable. Its admission was directly contrary to the holding of the United States Supreme Court. The trial Court deemed these declarations admissable after the consummation of the alleged conspiracy, because Lucas was a self-confessed conspirator. But his confession is not admissable against the other defendants, when made in their absence, and after the conspiracy, if any, had been consumated. The United States Supreme Court in Sparf vs U. S., supra, said: "But the confession and declaration of Hanson to Sodergren after the killing of Fitzgerald were incompetent as evidence against Sparf. St. Clair, Hanson were charged jointly with the murder of Fitzgerald. What Hanson said after the deed had been fully consummated and not on the occasion of the killing and in the presence only of the witness, was clearly incompetent against his co-defendant Sparf, however strongly it tended to connect the latter with the commission of the crime. If the evidence made a case of conspiracy to kill and murder the rule is settled that after the conspiracy has come to an end whether by success or by failure, the admission of one conspirator by way of narrative of past facts are not admissable

against the others."

If statements made by Lucas after the end of the alleged conspiracy, are admissable, then he, could manufacture evidence mountains high against plaintiffs in error, by confessing his own guilt to an innumerable number of persons and connecting the plaintiffs in error with his unlawful scheme. If witness McCormick may testify that Lucas admitted his guilt to him, then all that Lucas need do is to hire a hall, and proclaim his guilt from the platform, and call in the audience to testify at the trial of plaintiffs in error, as to what Lucas announced.

In People vs Oldham (Calif.) 44 Pac. 312, the Supreme Court of California said: "Evidence of the statements of a co-conspirator, made during the life of the conspiracy, are admissable against the other conspirator; but after the crime has been committed, the conspiracy is an accomplished fact. It is a thing of the past, and such statements of a co-conspirator stand in no different relation to the law, and are no more admissable against a defendant, than though he were a stranger to the whole transaction, for they are the purest hearsay. This Court said, in People vs Moore, 45 Cal., 19: 'It was never competent to use as evidence against one on trial for an alleged crime the statements of an accomplice not

given as testimony in the case, nor made in the presence of defendant, nor during the pendency of the criminal enterprise and in furtherance of its objects. To hold such testimony admissable would be to ignore the rules of evidence settled and everywhere recognized from the earliest times.' The same doctrine is also reiterated in People vs Dilwood, 94 Cal., 89, 29 Pac. 420. It seems hat the trial Court admitted some of this objectionable evidence upon the ground that the statements were proper as proving the commission of the robbery by Hilton, but that cannot be so. As against the defendant, the actual commission of the robbery by Hilton could not be proven by his extrajudicial confessions; certainly not, in a case like this, where they were made without his presence and hearing. If Hilton had refused to take the stand and testify, it would not be contended for a moment that his confessions could have been used against this defendant for the purpose of proving the robbery, or for any other purpose.

"It is insisted that the foregoing error of the Court was cured when the witness Hilton took the stand, and gave to the jury substantially the same statements and confessions he had prior to that time made to the officers. We cannot say that the jury attached no importance to these

statements of Hilton, made shortly after the commission of the crime, nor that the verdict would have been the same if they had been rejected by the Court."

We also submit, that since the Government dismissed the indictment against Lucas and Boomer, that this was an acquittal of each of them. And if the principal was never engaged in a conspiracy, then plaintiffs in error could not be co-conspirators with either Lucas or Boomer. And acts or declarations of either Lucas or Boomer could not bind nor militate against plaintiffs in error.

Paul vs State 12 Tex. App. 346.

## SECOND

### Assignments of Error Nos. 3, 4, 5 and 6

With reference to Assignments of Error Nos. 3 and 4, we say: That when Jack Platt, a witness on behalf of the Government, who was upon the witness stand the following occurred. He said he made a trip with Joe Lucas from Centralia, Washington, to San Francisco, California, the part of February, 1919.

By Mr. Conway, Asst. U. S. District Attorney:

Q. Had you done anything preparatory to your trip to San Francisco?

Mr. Welsh: Objected to as incompetent.

The Court: Overruled.

Mr. Welsh: Exception.

A. When I was down there I prepared some dry cell batteries.

Mr. Welsh: I ask that the answer be stricken as not responsive.

The Court: Motion denied.

Mr. Welsh: Exception.

Q. Did you make any preparations in Centralia for the trip?

A. Yes.

Q. What did you do?

Mr. Welsh: We object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Welsh: Exception.

A. Made some tops for the cans of the dry cell batteries.

Q. What did you fill those bottles with?

Mr. Welsh: We object to that as incompet-

ent, hearsay as far as these defendants are concerned.

The Court: Overruled.

Mr. Welsh: Exception.

A. Filled them with whiskey, there were 1000 of them. I put them in cans, like Exhibit **No. 1.**

Page 35 of Trans.

We submit that there was not sufficient proof nor any proof establishing a conspiracy between Lucas and the plaintiffs in error, to ship intoxicating liquor into the State of Washington to a fictictious consignee. Since the plaintiffs in error are not shown by the evidence to have been parties to such a conspiracy, then whatever Jack Platt did would not be evidence against them, and his acts and declarations are inadmissable.

**Com.** vs Waterman, 122 Mass. 43.
People vs Arnold, 46 Mich. 268.
Hamilton vs Smith, 39 Mich. 222.

There was no evidence showing nor tending to show a conspiracy and therefore, the acts of Jack Platt may not be used to establish the alleged or any conspiracy.

People vs Parker, 67 Mich., 222, 34 N. W., 720.

## THIRD

### Assignments of Error No. 7

We contend that the Honorable District Court erred in admitting in evidence, over the objections of plaintiffs in error, Exhibits 5 and 6, for the reason that they were not identified. In order that this Court observe that this objection should have been sustained we call your attention to the evidence:

Witness Jack Platt was the party who packed the whiskey and placed it upon the "Admiral Schley" at San Francisco.

His testimony is as follows:

Q. What did you fill those little bottles with?

Mr. Welsh: We object to that as incompetent, hearsay as far as the defendants are concerned.

The Court: Objection overruled.

Mr. Welsh: Exception.

A. Filled them bottles with whiskey. There was 1,000 o fthem. I put them in cans, like Ex-

hibit 1 and packed them in packing cases and nailed them up.

Exhibit 2 is the same packing case they were packed in; 125 in a box; Exhibit 2 is similar to the the whiskey that went into those bottles. The packing that was done in San Francisco. There were eight of these boxes so packed. I did not buy the whiskey that went into those bottles, it was brought up to the house where I was packing the cases and I filled the bottles and packed the cases myself. I first saw that big trunk in Centralia; Mr. Lucas had it; I saw it in San Francisco; I had it there; I got it from the railroad station; it was shipped by express to Mr. Johnson: I took it up to the house where I rented, on Webster street; I opened it and took out what I needed and filled up these cans. After I got through with it, I put in three cases of bonded goods, whiskey.

Exhibit 5 for identification is the bonded whiskey. It was Old Taylor and Sunnybrook in pint bottles.

(Testimony of Jack Platt:)

I recognized Exhibit 6 for identification as the same kind.

Mr. Conway: I offer in evidence Exhibits 5 and 6.

Mr. Welsh: Objected to, not identified.

The Court: Objection overruled. They will be admitted in evidence.

Thereupon, said bottles of whiskey were marked as Government Exhibits 5 and 6.

Mr .Welsh: Note an exception, please.

Trans, Page 37-38.

On cross-examination witness, Jack Platt testified as follows:

(By Mr. Welsh:)

At the time I was arrested, the liquors were seized by the Government. **I could not swear that the liquor introduced in evidence was the same liquor shipped. Of course, there are many bottles similar to that.** I am pretty sure that these dry cells were the same. I do not know of anybody else making any caps like that. I did not make the cans; I made the caps. Lots of batteries are just like these.

After the liquor was placed upon the Steamer Schley in a trunk and boxes at San Francisco Jack Platt never again saw the liquor.

Upon arrival of the Steamer Schley at Seattle, on March 1st ,1919, some intoxicating liquor was seized by Federal officers. Page 38

of Trans.

Geo. W. Berg, a Government witness, on that point testifi,ed as follows:

Direct examination (by Mr. Conway:)

My name is Georg eW. Berg. I have been an employee of the Department of Justice for nine years. I recognize Government's Exhibit 1. It is whiskey in these dry cell battery containers, shipped from San Francisco on the "Admiral Schley." I first saw it the first of March, this year. On the 28th day of February, I was advised through Agent Orr of San Francisco that the shipment was enroute, and would reach Seattle on the "Schley." Orr arrived here the day previous, and he and I, on the morning of March 1st, met the "Schley" at Pier D, Seattle, and when the shipment was unloaded, we seized it and opened one of the cases there; found it to contain these dry cell batteries and whiskey in these bottles. There were eight cases. The Goverment's Exhibit 2 is one of the cases. There were eight of these boxes just like Goverment's Exhibit 2. They were billed to Johnson S. & E. Company at Seattle, which is a fictitious address. There is no such place. These red cans were packed in the cases. This box is packed in the Government's Exhibit 1 were in those cans. Most

same way; 125 of these cells in each case. packed similar to that. Bottles of whiskey similar to with the exception of the exhibits that were used of the whiskey was destroyed that same evening, in Platt's trial and this here.

I first saw Government's Exhibit 7, this big trunk in the hold of the "Schley." When the trunk had been coming up, it was empty, with the exception of a package of (41) these labels. The trunk had been broken open in the hold. Immediately on the trunk coming up, we went down in the hold of the boat, and made an examination there and found practically all the whiskey that had been taken and hid in different places of the hold, probably fifty or sixty pint bottles. Goverment's Exhibit 5 is one of them.

Goverment's **Exhibit 6 shown witness,** and he testified that it is a pint of Sunybrook whiskey **that he first saw it in the hold of the ship at the time.**

Trans. Page 42-43.

**Joe Lucas,** who purchased the whiskey, in San Francisco testified as follows:

"I did not ship anything, the trunk and shipment went together. Platt did the packing and filled the dry-cells with liquor. I did not have a

thing to do with htat. I did not see this box shipped, and do not know whether it was shipped all together or not. I could not say that I did see this box packed, nor could I swear that it was the same box that was packed in San Francisco and shipped to Seattle, because I did not put my own mark on it to identify it. I do not know whether the dry cells were full or empty when they left San Francisco.

Mr. Welsh: We move to strike out all the evidence about that box.

The Court: It having gone in without objection, the motion will be denied.

I did not bring any whiskey with me. I had three cases shipped from San Francisco; that was in addition to the dry-cells shipment, but I could not positively swear that they were ever shipped. I do not know in my own knowledge that this box and its contents ever left San Francisco, or that these dry-cells were filled with whiskey. I did not fill any (32) dry cells down there myself, nor had anything to do with filling them. I saw some of the dry-cells filled, but could not swear that these are the dry-cells I saw filled."

Trans. Page33-34.

The foregoing is all the evidence with ref-

erence to Ehibits 5 and 6. Exhibit Number 5 was bonded whiskey. Exibit 6 was also whiskey.

The Court should have sustain the objection of the plaintiffs in error for the whiskey which was introduced in evidence was not identified as the whiskey that was shipped by Platt from San Francisco.

You will bear in mind that when the whiskey as shown by Exhibits 5 and 6, arrived in Seattle, as Berg testified, that there was no whiskey in the trunk but the whiskey they found and confiscated, Exhibits 5 and 6, was found in the holds of the ship.

We insist that there is no evidence even tending to show that the whiskey which was introduced in evidence, Exhibits 5 and 6, was the whiskey wihich was purchased by Lucas and shipped by Platt, on the Steamer "Schley".

When Platt shipped the whiskey, it was in boxes, what whiskey was introduced in evidence was found in the holds of the ship.

During these prohibition days it appears to us that the Court, even if it will not take judicial notice of the fact, will assume in passing upon, Assignment of Error Number 7, that there were other people who may have shipped this whiskey on the Steamer "Schley" and that perhaps other who were on the Steamer "Schley" had whiskey,

and for all that we may know and for all that anybody knows, the whiskey which was introduced in evidenced, as Exhibits 5 and 6 may have been whiskey belonging to parties other than the parties involved in the case at bar.

## FOURTH

### ASSIGNEMENT OF ERROR NO. 18.

The Honorable District Court erred in allowing the defendant, H. K. O'Neill, a witness on behalf of the Government to testify in rebuttal as to the price of 3 Star Hennessey and as to the price of bonded one-hundred proof whiskey, for the reason that the same was immaterial, irrelevant and improper in rebuttal or otherwise. The evidence of O'Neill is as follows:

### DIRECT EXAMINATION

(By Mr. Conway)

Lived in Tacoma a great many years. Prior to the first day of January, 1916, I was connected with the liquor business.

Q. Can you now testify as to what the price was on 3 Star Henessey, by wholesale, per case, at that time?

Mr. Welsh: I object to that as immaterial, improper rebuttal, irreelevant, because no matter

what the price was, it was not for sale on the market, had no marked price.

The Court: He is asking about prior to Jan. uary, 1916. Objection overruled, but the jury will not only take into account the circumstances and what the market value was on this particular liquor at that time, but the various explanations given, that it was a conversation concerning 3 Star Hennessey. You may answer the question.

Mr. Welsh: Exception.

A. Eighteen dollars a case.

Q. What was the price of bonded one-hundred proof whiskey at that time?

Mr. Welsh: We object to that as immaterial.

The Court: Overruled.

Mr. Welsh: Exception.

A: Well, it was all different prices according to the grade of the liquor. Sunnybrook was $8.00 or $9.00 a case of 12 quarts. Old Taylor was about $9.00. Old Crow $11.50. Ordinary bonded whiskey was around these prices. 3Star Hennessey Brandy is imported.

P. 78-79 of Trans.

We submit that this evidence was entirely immaterial and especially in rebuttal and it militated most disastrously against the plaintiffs in

error.

## FIFTH

ASSIGNMENTS OR ERROR NO. 15 & 16.

When plaintiff in error, August Oess was upon the witness stand the following proceeding occured on cross examination of the witness:

Mr. Conway, U. S. District Attorney for the Government cross examining the defendant,

Q: Now, I want you to explain to this jury why it is, or if you can explain why Joe Lucas should concoct the story that he has on you and Bruce Richards.

Mr. Welsh: We object to that as not a fair question.

The Court: Overruled.

Mr. Welsh: Exception.

A. Not any more than to protect himself, I guess, that is the only thing I can say, the only thing I can give any reason for; I never can give any reason for it in the world, because what I told you is true just the same.

Q: You think Joe is protecting himself?

A: I don't know, but that is the only answer that I could give; I do not know **why he wants** to

get out of from it that way. I guess he did not have much chance to protect himself.

Q:What?

A: He did not have much chance to protect himself: he has already got his, I guess.

Mr. Welsh: I move to strike out the answer, because the witness, the record of this court shows that the indictment against him, Lucas has been dismissed.

The Court: Motion denied.

Mr. Welsh: Exception.

I have known Boomer for a couple of years. As far as I know, have been friendly. Never had much to do with him. Know him, that is all.

Q: Can you explain why he is testifying as he did to day against you?

A: No, I don't.

Mr. Welsh: We object to that question.

The Court: Overruled.

Mr. Welsh: Exception.

Q: You cannot offer any explanation about that?

A: No, sir.

Q: Can you explain why Mrs. Lucas has testified as she has against you?

Mr. Welsh: We object to that for the same reason, incompetent, irrelevant and immaterial.

The Cour: Overruled.

Mr. Welsh: Exception.

A: No.

We submit that such interogation of the plaintiff in error was unfair and humiliating to him, and reflected against him before the jury.

It consisted of an argument between the District Attorney and plaintiff in error, on a question upon which the District Attorney was better advised than the plaintiff in error.

If the District Attorney had not dismissed the indictment against Lucas and Boomer and if he had prosecuted Platt, perhaps they would not have verbally assaulted defendant, Oess.

We submit that the action against plaintifs in error should be dismissed, the judgment reversed and defendants discharged; and in any event that plaintiffs in error should be granted a new trial.

Respectfully submitted,

BATES & PETERSON,
GEO. DYSART
JOHN T. WELSH
Attorneys for Plaintiffs in Error.

# In the United States Circuit Court of Appeals for the Ninth Circuit

No. 3381

BRUCE RICHARDS AND AUGUST OESS,

*Plaintiffs in Error,*

vs.

UNITED STATES OF AMERICA,

*Defendant in Error.*

---

*Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.*

---

## BRIEF OF DEFENDANT IN ERROR

ROBERT C. SAUNDERS,
United States Attorney,

F. R. CONWAY,
Assistant United States Attorney,
Attorneys for Defendant in Error.

Office and Postoffice Address:
324 Federal Building, Tacoma, Washington.

---

Metropolitan Press, Seattle

# In the United States Circuit Court of Appeals for the Ninth Circuit

No. 3381

BRUCE RICHARDS AND AUGUST OESS,

*Plaintiffs in Error,*

vs.

UNITED STATES OF AMERICA,

*Defendant in Error.*

---

*Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.*

---

## BRIEF OF DEFENDANT IN ERROR

ROBERT C. SAUNDERS,
United States Attorney,

F. R. CONWAY,
Assistant United States Attorney,
Attorneys for Defendant in Error.

Office and Postoffice Address:
324 Federal Building, Tacoma, Washington.

## ARGUMENT

The several questions presented by the brief of the plaintiffs in error will be here discussed in five subdivisions, each designated by a Roman numeral, and conforming to the grouping of assignments adopted in the brief of the plaintiffs in error.

### I.

As to the contention that the evidence is insufficient and that there is a variance between the indictment and the proof, it is important, first, to notice that the prohibition of section 240 of the Criminal Code is against the interstate shipping and causing to be shipped of any package containing intoxicating liquor,

> "unless such package be so labeled on the outside covering as to plainly show the name of the consignee, the nature of the contents and the quantity contained therein."

This phase of the case is presented by the plaintiffs in error as if the statute provided, and it were necessary for the Government to prove, shipment "to a fictitious consignee (or) by a false label." (Brief of plaintiffs in error pp. 14, 17). It is manifest from a reading of the statute that all that is necessary to support a conviction is interstate shipment of a package containing intoxicating liquor, the outside covering of which does not show all of the three things required, namely, name of consigee, nature and quantity of contents.

The indictment follows strictly the language of the statute.

It is contended that because before the trial Lucas was dismissed from the case, neither of the plaintiffs in error can be convicted of conspiracy with him; and that because neither of them can be so convicted the judgment must be reversed. For the sake of the argument the proposition of law involved may be conceded, but the indictment charges a conspiracy among the plaintiffs in error and four others. After Lucas and Boomer were dismissed, four remained. Toles and Symons were acquitted by the jury. If there is substantial evidence of the conspiracy as between Oess and Richards, the plaintiffs in error, that is sufficient, because they were both found guilty. Thus only two questions are presented, (a) Did Oess and Richards conspire with each other, and (b) Did their conspiracy contemplate the interstate *shipment* of whiskey from California into Washington.

(a) The plaintiffs in error say: (Brief p. 17)
"There is evidence tending to show that Lucas talked with plaintiffs in error before he went to California, and intended to *ship* intoxicating liquors into the state of Washington."

In addition to testimony as to numerous conversations between Lucas and each of the defendants in error separately in which the projected transaction was dis-

cussed and planned, there is this testimony of Lucas: (Record p. 28)

> "A few days before I went away I had a talk with Oess and Richards and we discussed about buying whiskey and bringing it into Centralia, and Oess suggested that he drive his truck along the prairie and unload the booze on the prairie into his truck, and Richards says: 'That's all right for me.' "

It is unnecessary to search the record further for evidence of an agreement between the plaintiffs in error on the subject of their getting whiskey through Lucas.

(b) The following excerpts from the record show that it was understood among Lucas and the plaintiffs in error that Lucas was going to California, and was to get the liquor there:

Testimony of Joe Lucas: (Record p. 27)

> "I contemplated, about February 7th last, a trip from Centralia to San Francisco, and about three weeks before I left I had a talk with August Oess, one of the defendants, in regard to it. He asked me if I would bring him back some whiskey, and I said, 'Yes.' We had several conversations along the same line. These conversations with Oess always referred to when I was going to California. I also had a conversation on the same subject with the defendant, Bruce Richards, about the same time. He asked me if I was going to Frisco and would I bring him back some whiskey, and I told him 'yes.' I had several subsequent conversations with him. I went to San Francisco

> on February 8th this year, and about two weeks before I left, Mr. Richards gave me $200.00 at one time, and $40.00 at another time, in cash. I asked him what kind of whiskey he wanted and he said he preferred bottled in bond in quart bottles."

Then follows the testimony above quoted as to the conversation among Lucas, Oess and Richards about buying whiskey and bringing it into Centralia, in which it was suggested by Oess that the whiskey be unloaded on the prairie, and from there carried in his truck, to which proposal Richards assented.

Lucas further testified: (Record p. 30) That the third day after his return to Centralia from California he had a conversation with Oess, and Richards, in his, Lucas', apartments, in which he told them that the whiskey had been lost. Detailing that conversation further, this witness testified:

> "After I got through telling Oess and Richards, Oess says: 'Joe, you were to bring this whiskey up in a pipe-organ and I do not know, if I had known it was to come in dry batteries, whether I would have gone into it or not.' Richards said that he thought it was to be brought up in the pipe-organ also, and seemed to be suprised, and expressed some sentiment that we lost it. Afterwards, Mr. Richards and Oess and Boomer came to see me at my apartments. Richards says: 'We came for our whiskey or our money.' I says: 'I cannot give you the

> whiskey,' and then my wife says: 'Give them back their money and pay them in a check. Then it was talked over that we ought to do something for Platt. Mr. Richards says: '*Yes, we got him into this, we ought to help him out.* (Record p. 32). At another time, in my apartment, in the presence of Oess and Boomer, Richards said that somebody had squealed; that he thought there was only to be four in this; he said, too many in it, as he looked at it. If he had thought there was going to be more than four in it, he would not have gone into it. He understood that Oess, myself and himself, and Jerry Driscoll were the only ones in it."

It should be noticed also that Oess, in testifying as to a conversation between Lucas and Richards, at which Oess was present, (Record p. 68), after denying that he had any memory of California being mentioned, quotes Richards as saying to Lucas that the latter was to bring him *back* some brandy.

It is submitted that neither the manner in which, nor the means by which the conspiracy contemplated the bringing of the liquor into Washington is an essential or material element of the crime, if only it was agreed that the liquor should be *shipped* or caused to be *shipped.* That the agreement contemplated that the liquor should be *shipped* is evidenced by the following from the record. Testimony of J. H. Boomer: (Record pp. 39-41).

> "I heard it talked among myself, Oess and Richards that he (Lucas) was going to ship a pipe-organ back." "They (Rich-

ards and Oess) told me that Mr. Lucas was trying to get away with this money, and would never *ship* the goods. Oess and Richards claimed that Lucas *shipped* the stuff in batteries instead of the pipe-organ. They understood he was to *ship* it in quart bottles in this pipe-organ, and that is one thing they claimed that Lucas was defrauding us out of our money."

"Mr. Richards came to my place of business at Centralia both before and after we were arrested. He claimed that Mr. Lucas had no business to *ship* liquor in the battery cans; it was supposed to be *shipped* in a pipe-organ, or in case lots; I do not know just how, and that is the only thing he did not like."

Testimony of Nellie Lucas: (Record p. 50).

"Mr. Richards was excited and said, 'They have got us all; they are going to arrest every one of us and take us to jail.' Now, he says: 'I will tell you what we are going to contend—we are going to contend that you were going to *ship* the booze in the pipe-organ and bonded liquor and we are going to contend that the booze came in at the Milwaukee depot and we have already got our booze, and that you had already shipped it in.' "

Testimony of J. W. MacCormack: (Record pp. 56, 57).

"I asked Richards if he had admitted giving his money to Lucas for the purpose of *shipping* bonded whiskey from San Francisco to Centralia, and had also stated that to John Berry, to go to the Dale Hotel in Centralia and make the same admission in the presence of myself and Agent McIntosh. *He agreed to do so,*

> but asked me if, before he went to the Dale Hotel with the purpose of making this admission, I would accompany him to Oess, and I agreed to. He introduced me to Oess, and in Mr. Richard's presence I told Mr. Oess who I was and why I was there. I told Oess that Mr. Richards had already admitted he had given $240.00 to Lucas for *this purpose;* that I understood that Oess had given $400.00, and Oess admitted that he had given $400.00. After Richard's arrest in the engineer's office in Chehalis, in the presence of Mr. McIntosh, he admitted that he had given money to Lucas for the purpose of purchasing bonded whiskey in San Francisco to *ship* to Centralia,."

The last element of the offense, namely, the intended shipment without the markings required by statute on the outside coverings of the packages is supplied by the testimony which runs throughout the record, and which in part already has been quoted, to the effect that it was agreed that the liquor should be shipped in the pipes of a pipe-organ that Lucas contemplated buying in California, and also by the circumstance that the statute of the state of Washington at the time of the agreement prohibited all shipments of intoxicating liquor into that state for beverage purposes, except in limited quantities and upon permits issued by county auditors. (Laws of Washington 1915, p. 2). The jury might reasonably deduce from the evidence that according to the agreement the liquor was

to be shipped in the pipes of a pipe-organ that the parties mutually understood and intended that the packages should not have on the outside covering the name of the consignee, or the nature and quantity of the contents, because that, the court judicially knows, is a most novel way of packing whiskey for shipment. Further, the defendants, being charged wnth knowledge of the state law, knew that unless the liquor should be marked in conformity to the terms of section 240 of the Criminal Code the shipment of it into the state of Washington would be an offense against the laws of that state, and knew that if the packages should be so marked it would be impossible for delivery to be made to them. The agreement must be construed as having been made in contemplation of the law, and with propriety the question of the intent to ship without proper markings could have been submitted to the jury, and by the jury found against the defendants, from the bare fact that there was an agreement to have whiskey shipped from California into Washington, without the further evidence that it was agreed that it should be shipped in the pipes of a pipe-organ.

It is submitted that further discussion is unnnecessary to establish the proposition that there was sufficient evidence which conformed to the allegations of the

indictment to take the case to the jury, and to support the judgment.

Of the assignments discussed in pages 13 to 18 of the brief of the plaintiffs in error there remains to be noticed only assignment 14, which is predicated on a question propounded on cross-examination to a character witness. (Record p. 63). The question was answered favorably to the defendants.

Assignments 8 and 9 are discussed in the brief, pages 19 to 32, inclusive. Numerous authorities are cited and quoted from to the point that declarations of one conspirator made after the termination of the conspiracy will not bind another. Of course that is the law. There is also, however, the further well known proposition that evidence of admissions by a defendant are always competent. The matter objected to appears on page 39 of the record. The witness Boomer testified that after the liquor had been seized "I heard it talked among myself, Oess and Richards that he (Lucas) was going to ship a pipe-organ back." Declarations of that kind among Boomer, Oess and Richards are competent as admissions for what they are worth, as against Oess and Richards. In the same connection the witness gave further testimony about his having asked Lucas to slip in some whiskey for him. As it appears in the record, the objection and the motion to strike go to all

the above mentioned testimony of the witness, and even if that about Boomer's request to Lucas were objectionable, the objection and the motion to strike both were properly denied because they went to matter some of which is unobjectionable.

Assignment 9 is directed to the overruling of an objection to a question propounded to Boomer as to whether Lucas had said anything to him about what he was going to do in connection with a criminal prosecution. (Record p. 40). The answer was in the negative —so that the plaintiffs in error were not prejudiced.

Certain rulings of the court on the admissibility of evidence by the witness MacCormack are criticised in the brief on pages 24 to 27, inclusive. This alleged objectionable matter appears in the record, pages 51 to 54, inclusive, and need not be discussed further than to notice that all matter referred to was on motion of counsel for the plaintiffs in error struck out by the court, and the jury were instructed to disregard it. (Record p. 55).

With reference to the argument included in pages 24 to 32, inclusive, it should be said that nowhere in the record is there evidence which was permitted to go to the jury, over objection, of any extra-judicial declarations on the part of anybody other than the plaintiffs in error themselves, or of another or others in their

presence, or the presence of that one of them against whom such declaration was admitted.

II.

Assignments 3, 4, 5 and 6 all relate to rulings of the court on the admissibility of testimony of the witness Jack Platt. (Record pp. 35-38, inclusive). The only argument advanced in support of these assignments is based upon the proposition that there is no sufficient evidence of a conspiracy among the plaintiffs in error and Lucas; and that evidence of acts of Platt cannot be used to establish the conspiracy. The question of the sufficiency of the evidence of conspiracy has already been discussed.

III.

Assignment 7 goes to the admission in evidence, over objection, of two pint bottles of whiskey, one Old Taylor and the other Sunnybrook, because these exhibits were not sufficiently identified. (Record pp. 37-38). The objection, the exception and the assignment all go to the admission of both exhibits. Platt testified as to exhibit 5 as follows: (Record p. 37) "I put in three cases of bonded goods, whiskey." Exhibit 5 is identified as the whiskey. That is a sufficient identification of exhibit 5 to make it admissible. And as against the blanket objection against exhibits 5 and 6, both were admissible. It should be observed (Record

p. 38) that counsel did not move to strike the testimony as to these exhibits, or that the exhibits be withdrawn from the consideration of the jury, after the witness testified on cross-examination that he could not swear that the liquor introduced in evidence was the same liquor shipped. (Record p. 38) In any event, however, the witness testified that exhibits 5 and 6 were of the same kind as those he had shipped. And, as counsel, and no doubt the jury, well know, one pint of Sunnybrook or Old Taylor whiskey looks almost exactly like another. And the identity of these exhibits was not of importance, so long as the witness had testified that he shipped whiskey. It is not conceivable that the cause of the plaintiffs in error was prejudiced by the admission in evidence of these two exhibits, especially in view of the testimony of Platt on cross-examination that he could not swear that these exhibits were the same liquor that he shipped.

IV.

Assignment 18 is directed generally to the admission as evidence of the testimony of an expert as to the prevailing prices of 3 Star Henessey brandy, the kind that Richards claims he contracted for, and various brands of whiskey, before the prohibition law of Washington—on January 1st, 1916. This evidence was offered to rebut the testimony of Richards to the effect

that he contracted with Lucas for six cases of 3 Star Henessey Brandy, at $40.00 per case; (Record p. 72) and that he did not want whiskey, but if Lucas could not supply him with a full order of brandy he would take whiskey at the same price to make up the difference. (Record p. 75). If for no other purpose, this evidence was admissible to show the disparity in prices, at the most recent time at which there were market quotations, between the brandy and whiskey, the wholesale price of the former at that time being, as Mr. O'Neil testified, $18.00 a case, while various well known brands of whiskey at the same time ranged in price from $8.00 to $11.50 a case. Counsel contends that this evidence was highly prejudicial, but his ingenuity has not discovered any reason for that conclusion — and none suggests itself.

V.

Assignment 15 goes to the overruling of an objection to the question propounded to the plaintiff in error, Oess, on cross-examination as to whether he could offer an explanation as to why Lucas had testified against him and Richards as he did. The record shows that on his examination in chief this witness had flatly denied much of the testimony of Lucas. The witness had testified that he had known Lucas and that they had been friendly several years. If Lucas had a motive for

testifying falsely against that defendant that would have been material as affecting Lucas' credibility; and if the defendant Oess had known of the existence of that motive it would have been competent for him to testify about it. In fact, he did testify as to what he thought the motive was, but if he had been unable to assign any motive and had so testified in response to this question, no prejudice would have resulted to him. The latitude permissible in cross examination is very broad, especially in the case in which the defendant is the witness under examination, when that latitude is almost wholly within the discretion of the court.

Assignment 16 goes to the refusal of the court to strike out the answer of the witness to the question involved in assignment 15. No authority is cited in support of either of these assignments, and no reason is advanced why the answer to the question should be struck. It is submitted that this cross examination was proper.

Respectfully submitted,
ROBERT C. SAUNDERS
United States Attorney,
F. R. CONWAY,
Assistant United States Attorney,
Attorneys for Defendants in Error.

Receipt of copy of within brief on October 13, 1919, is acknowledged.

of Attorneys for Plaintiffs in Error.

No. 3382

# United States
# Circuit Court of Appeals

## For the Ninth Circuit.

---

NORTHERN IDAHO AND MONTANA POWER COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. L. JORDAN LUMBER COMPANY, a Corporation,

Defendant in Error.

---

# Transcript of Record.

---

**Upon Writ of Error to the United States District Court of the District of Montana.**

---



Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3382

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

---

NORTHERN IDAHO AND MONTANA POWER COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. L. JORDAN LUMBER COMPANY, a Corporation,

Defendant in Error.

---

# Transcript of Record.

---

**Upon Writ of Error to the United States District Court of the District of Montana.**

---

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index. Page

**Names and Addresses of Attorneys of Record.**

BENJAMIN S. GROSSCUP, Esq., of Tacoma, Wash.,

SIDNEY M. LOGAN, Esq., of Kalispell, Mont.,

Attorneys for Defendant and Plaintiff in Error.

J. E. ERICKSON, Esq., of Kalispell, Mont.,

T. H. MacDONALD, Esq., of Kalispell, Mont.,

HENRY C. SMITH, Esq., of Helena, Mont.,

Attorneys for Plaintiff and Defendant in Error. [1*]

---

*In the District Court of the United States in and for the District of Montana.*

No. 583.

A. L. JORDAN LUMBER COMPANY, a Corporation,

Plaintiff,

vs.

THE NORTHERN IDAHO & MONTANA POWER COMPANY, a Corporation,

Defendant.

BE IT REMEMBERED, that on March 23, 1917, a transcript on removal of the above-entitled cause from the District Court of the Eleventh Judicial District of the State of Montana, in and for the county of Flathead, was filed in the United States District Court for the District of Montana, the plaintiff's

*Page number appearing at foot of page of original certified Transcript of Record.

complaint contained in said transcript on removal, being in the words and figures following, to wit: [2]

*In the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Flathead.*

A. L. JORDAN LUMBER COMPANY, a Corporation,

Plaintiff,

vs.

THE NORTHERN IDAHO & MONTANA POWER COMPANY, a Corporation,

Defendant.

**Complaint.**

Plaintiff complains and alleges:

1. That the said plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Montana and doing business in the said State of Montana, with its principal office and place of business at Columbia Falls, Flathead County, Montana.

2. That the defendant, Northern Idaho & Montana Power Company is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, and doing business within the State of Montana, having its principal office and place of business at Kalispell, Flathead County, Montana.

3. That at all times hereinafter mentioned, the defendant, Northern Idaho & Montana Power Com-

pany, was and now is engaged in the business of generating, producing and distributing electricity and selling and applying the same for lighting, power and other purposes, to the general public for profit; and said company, at all times hereinafter mentioned, owned, controlled and maintained in the county of Flathead, Montana, an electrical plant for generating and distributing electricity to its patrons, customers and others with whom it had contractual relations.

4. That on the 25th day of December, 1916, for a valuable consideration and for the compensation demanded, defendant was engaged in supplying the plaintiff at its mill and place of business [3] above described, electricity for lighting and power purposes; that it was the duty of the defendant in furnishing said electricity, to at all times have and maintain a safe plant, machinery, poles, wires, conduits, converter boxes, transformers, fuses, plugs, and other necessary electrical apparatus, for the proper and safe generation, transmission and distribution of electricity to its patrons and customers, and especially to this plaintiff; and it was also its duty to inspect and examine the same at all reasonable times and intervals and at all times to keep and maintain the same in good repair and in safe condition, so that the plaintiff might at all times use the said electricity for power and lighting purposes, safely, without danger of loss, damage or injury to its property and premises.

5. That on the said 25th day of December, 1916, and for a long time prior thereto, the said defendant

did not discharge its duties heretofore described, but in violation of its said duties, carelessly, negligently and unskillfully wired said premises, and carelessly, negligently and unskillfully installed said electrical apparatus and appurtenances, and carelessly and negligently failed to keep and maintain the same in good repair, and carelessly and negligently permitted the said electrical apparatus and fixtures to become worn, damaged and defective, all of which was well known to the defendant, its agents, and employees; and by reason of said carelessness and negligence, such great voltage or load of electricity was carried to and upon the wires upon and within the premises of the plaintiff, and by reason of said excessive voltage and overloading of wires, and without any fault of the plaintiff, the said building, contents and property of the plaintiff heretofore described, on the morning of the 25th of December, 1916, caught fire from an electrical current furnished by the defendant, and the said building and property hereinbefore [4] described, were entirely destroyed, to the damage of plaintiff in the sum of $30,500.00.

6. That at the time of the burning of plaintiff's mill and property, as aforesaid, plaintiff was supplying lumber and lumber products to the trade along the line of the Great Northern Railway and its branch lines, in Montana and North Dakota, and had an established line of customers in said territory; that by reason of the burning and destruction of the property, as aforesaid, and by reason of the said carelessness and negligence of the defendant, plaintiff has been compelled to suspend business and has been de-

prived of means of supplying the trade and its customers with the products of its mill and factory, as aforesaid, to its further damage in the sum of $10,000.00.

WHEREFORE, plaintiff demands judgment for the sum of $40,500.00 and costs and disbursements of this suit.

FOOT & MacDONALD,
J. E. ERICKSON,
Attorneys for Plaintiff.

(Duly verified.)

Filed Feb. 24, 1917. R. N. Eaton, Clerk District Court. Filed Mar. 23, 1917. Geo. W. Sproule, Clerk U. S. Court. [5]

---

That the defendant's answer, contained in said transcript on removal, is in the words and figures following, to wit: [6]

(Title of Court and Cause.)

**Answer.**

Comes now the defendant in the above-entitled action and for answer to the complaint of the plaintiff herein:

1. Denies each and every allegation, matter and thing in said complaint contained, alleged or set forth not hereinafter generally or specifically admitted or denied.

2. Admits the allegations of paragraphs 1, 2, and 3 of said complaint.

3. Defendant admits that on 25th of December,

1916, for a valuable consideration and for the compensation demanded, the defendant was engaged in supplying the plaintiff at its mill and place of business described in said complaint, electricity for lighting and power purposes; but denies that it was the duty of defendant in furnishing said, or any, electricity, or otherwise, or at all, to, at all times, or at all, have or maintain a safe plant, machinery, poles, wires, conduits, converter-boxes, transformers, fuses, plugs, or other necessary, or any, electrical, or any, apparatus for the proper or safe, or any generation, transmission, or distribution of electricity to its patrons or customers or especially, or at all, to the said plaintiff; and denies that it was, also, or at all, its duty to inspect or examine same at all reasonable, or any times or intervals, or at all, or any times to keep or maintain the same in good, or any [7] repair or safe, or any condition, so that the plaintiff might at all, or any, times use the said electricity for power or lighting, or any purposes, safely, or otherwise without danger or loss, damage or injury to the property or premises, or otherwise, or at all.

4. Defendant denies each and every allegation, matter and thing contained, alleged or set forth in paragraph five (5) of said complaint.

5. Answering paragraph six (6) of said complaint and as to whether at the time of burning of plaintiff's mill or property as alleged in said complaint, or at any other time, or at all, plaintiff was supplying lumber or lumber products to the trade, or otherwise, along the line of the Great Northern Railway or its branch lines in Montana and North Dakota or either

of said states, or elsewhere, or otherwise, or at all, or had established a line of customers in said territory or elsewhere, or at all, or that by reason of the burning or destruction of the property mentioned in said complaint, or otherwise, or at all, or by reason of the said, or any carelessness and negligence of the defendant, or otherwise, plaintiff has been compelled to suspend business or has been deprived of means of supplying the trade or its customers with the products of its mill or factory, or otherwise, or at all, to its further damage in the sum of $10,000.00 or any other sum or amount whatsoever, this defendant denies that it has any knowledge or information sufficient to form a belief and defendant further denies that any loss, which said plaintiff has sustained by reason of any fact alleged in said paragraph six (6), or otherwise, or at all, has been sustained by reason of carelessness or negligence of this defendant.

6. Further answering said paragraph six of said complaint the defendant avers that said paragraph does not state facts sufficient to constitute cause of action against this defendant. Further answering said complaint as a whole the defendant avers that said complaint does not state facts sufficient to constitute cause of [8] action against this defendant.

WHEREFORE, defendant prays judgment for its costs of suit.

LOGAN & CHILD,
Attorneys for Defendant.

(Duly verified.)

Filed Mar. 16, 1917. R. N. Eaton, Clerk District Court. Filed Mar. 23, 1917. Geo. W. Sproule, Clerk U. S. Court. [9]

---

The petition for removal, contained in said transcript on removal, is in the words and figures following, to wit:

(Title of Court and Cause.)

**Petition for Removal.**

To the Honorable the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Flathead:

The petition of the Northern Idaho and Montana Power Company, the defendant in said above-entitled cause, respectfully shows and represents to this Honorable Court:

1. That your petitioner is the sole and only defendant in said above-entitled cause, and that the said action has been commenced against your petitioner by the plaintiff, the A. L. Jordan Lumber Company, in said above-entitled court, and the said action is now pending therein for recovery in favor of said plaintiff and against this defendant in the sum of $40,500.00 damages and the costs of the action upon an alleged liability for general and special damages, it being alleged in said plaintiff's complaint that on or about the 25th day of December, 1916, for a valuable consideration and for the compensation demanded, defendant was a company organized for the purpose of selling and distributing electricity to its

customers and was engaged in supplying the plaintiff at its certain saw mill in Flathead County, Montana, electricity for lighting and power purposes, and that it was the duty of the defendant, in furnishing such electricity, to at all times have and maintain a safe plant, machinery and equipment, and that on said 25th day of December, 1916, and for a long time prior thereto this defendant did not discharge its duty as set forth in said complaint, but in violation of [10] said duty carelessly, negligently and unskillfully wired the premises of the plaintiff, and carelessly, negligently, and unskillfully installed certain electrical apparatus and appurtenances, and carelessly and negligently failed to keep same in good repair, and carelessly and negligently permitted the said electrical apparatus and fixtures to become worn, damaged, and defective, by reason thereof the said premises and property caught fire and was entirely destroyed, to the damage of the plaintiff in the sum above mentioned, all of which is fully shown and set forth in plaintiff's complaint on file herein, to which reference is hereby made.

2. That your petitioner disputes the claim made by said plaintiff and denies any and all liability to said plaintiff on account of the destruction and loss of said mill, property, and premises.

3. That said action is and involves a controversy wholly between citizens of different states. That said action was begun against your petitioner in said above-entitled court on the 24th day of February, 1917. That when said action was commenced, said plaintiff was, ever since has been, and now is a cor-

poration, organized and existing under the laws of the State of Montana, and during all of said times was a citizen of the State of Montana, and was not at any of said times a citizen of any other state of the United States of America. That your petitioner, this defendant, the Northern Idaho & Montana Power Company, at the time of the commencement of this action, was, ever since has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and at all of said times was and now is a citizen of said State of Delaware, and that at all times was and now is a citizen of a State of the United States other than the State of Montana.

4. That said action is of a civil nature and the matter and amount in dispute herein between said plaintiff on the one side [11] and said defendant on the other, exceeds, exclusive of interest and costs, the sum of $3,000.00, and it is a cause removable to the United States District Court for the District of Montana, by virtue of the provisions of the statutes of the United States, upon the ground of the diversity of citizenship of the said plaintiff on the one side and said defendant on the other side.

5. That your petitioner was served with summons in said action in the city of Kalispell, county of Flathead, State of Montana, on the 26th day of February, 1917, and the time in which your petitioner is required to appear in said action has not yet expired.

6. That your petitioner herewith presents a good and sufficient bond as provided and required by the statute in such case made and provided, that it will

enter in the District Court of the United States for the District of Montana, within thirty days of filing this petition for removal, a certified copy of the record of this action and for payment of all costs that may be awarded by said District Court of the United States for the District of Montana, if said District Court of the United States shall hold that said above-entitled cause was wrongfully and improperly removed thereto.

WHEREFORE, your petitioner prays that this action be removed to the District Court of the United States in and for the District of Montana, that this Honorable Court accept this petition and said bond and proceed no further in said cause, except to make order for the removal of said cause to said District Court of the United States for the District of Montana.

NORTHERN IDAHO & MONTANA POWER CO.,

By SIDNEY M. LOGAN,

Its Attorney Thereto Duly Authorized.

LOGAN & CHILD,

Attorneys for Petitioner.

(Duly verified.)

Filed Mar. 16, 1917. R. M. Eaton, Clerk District Court. Filed Mar. 23, 1917. Geo. W. Sproule, Clerk U. S. Court. [12]

Thereafter, on March, 11, 1918, a stipulation to amend the complaint was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

**Stipulation to Amend Complaint.**

IT IS HEREBY STIPULATED AND AGREED by and between the above-named parties, through their attorneys, C. H. Foot and J. E. Erickson for plaintiff, and Logan and Child for the defendant, that the plaintiff's complaint herein be amended by adding to the said complaint paragraph 3a as follows:

> 3A. That on the twenty-fifth day of December, one thousand nine hundred sixteen, and for a long time prior thereto, the plaintiff owned and operated a planing-mill at Columbia Falls, Montana, said mill and plant being located on the Northwest Quarter of Section Nine, Township Thirty North, of Range Twenty West, Flathead County, Montana. That said plaintiff was, on said day, and had been for a long time prior thereto, engaged in the manufacture of lumber and lumber products and buying and selling the same both wholesale and retail. That for the purpose of conducting said business, said plaintiff, on said date, owned and occupied certain buildings on said above described premises, to wit: Main building, 44x55 ft., workroom 20x70 ft., filing-room 20x26 ft., said building being of the aggregate value of Sixty-five Hundred Dollars; that upon said date above mentioned, the

plaintiff had a stock of lumber and lumber products on hand on said premises and in said buildings, of the value of Three Thousand Dollars; that installed within said buildings were machinery, tools and equipment for the purpose of carrying on said business of the value of Twenty-one Thousand Dollars. [13]

IT IS FURTHER STIPULATED AND AGREED by and between the said parties that each and every allegation, matter and thing contained in said paragraph 3a is to be deemed as denied by the defendant.

J. E. ERICKSON,
C. H. FOOT,
Attorneys for Plaintiff.
LOGAN & CHILD,
Attorneys for Defendant.

Filed March 11, 1918. C. R. Garlow, Clerk. [14]

---

Thereupon, pursuant to said stipulation, the complaint was amended by adding thereto paragraph 3–A as follows:

**Amendment to Complaint.**

"3–A. That on the twenty-fifth day of December, one thousand nine hundred sixteen, and for a long time prior thereto, the plaintiff owned and operated a planing-mill at Columbia Falls, Montana, said mill and plant being located on the Northwest Quarter of Section Nine, Township Thirty North, of Range Twenty West, Flathead

County, Montana. That said plaintiff was, on said day, and had been for a long time prior thereto, engaged in the manufacture of lumber and lumber products and buying and selling the same, both wholesale and retail. That for the purpose of conducting said business, said plaintiff, on said date, owned and occupied certain buildings on said above-described premises, to wit: Main Building, 44x55 ft., workroom 20x70 ft., filing-room 20x26 ft., said buildings being of the aggregate value of Sixty-five Hundred Dollars; that upon said date above-mentioned, the plaintiff had a stock of lumber and lumber products on hand on said premises in said buildings, of the value of Three Thousand Dollars. That installed within said buildings were machinery, tools and equipment for the purpose of carrying on said business of the value of Twenty-one Thousand Dollars." [15]

---

Thereafter, on February 3d, 1919, the opinion of the Court was duly filed herein, which appears hereinafter in the bill of exceptions, and on February 5th, 1919, judgment was duly rendered and entered as follows, to wit: [16]

(Title of Court and Cause.)

#583.

**Judgment by the Court.**

This cause came on regularly for trial on the 30th day of March, 1918, J. E. Erickson, T. H. McDonald

and Henry C. Smith, Esqs., appearing as counsel for plaintiff, and Logan, Child and Grosscup, Esqs., for the defendant. A trial by jury having been expressly waived by the respective parties, the cause was tried before the Court, sitting without a jury, whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined. The evidence being closed, the cause was submitted to the Court for consideration and decision, and after due deliberation thereon, the Court orders that judgment be entered herein in favor of the plaintiff and against the defendant for the sum of $34,500.

WHEREFORE, by reason of the law and premises aforesaid, it is ordered, adjudged and decreed that A. L. Jordan Lumber Company, the plaintiff do have and recover of and from Northern Idaho and Montana Power Company, a Corporation, the defendant the said sum of Thirty-four Thousand Five Hundred ($34,500.) Dollars. Together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $577.40 *Dollars.*

Judgment rendered February 5th, 1919.

C. R. GARLOW,
Clerk. [17]

---

Thereafter, on June 13th, 1919, bill of exceptions was duly settled and allowed, and filed herein, being in the words and figures following, to wit: [18]

*In the District Court of the United States for the District of Montana.*

A. L. JORDAN LUMBER COMPANY, a Corporation,

Plaintiff,

vs.

NORTHERN IDAHO & MONTANA POWER COMPANY, a Corporation,

Defendant.

**Bill of Exceptions.**

APPEARANCES:

HENRY C. SMITH, J. E. ERICKSON, T. H. McDONALD, for Plaintiff.

B. S. GROSSCUP, SIDNEY M. LOGAN, for Defendant. [19]

INDEX.

WITNESSES.

DEFENDANTS.

WITNESSES.

*In the District Court of the United States for the District of Montana.*

A. L. JORDAN LUMBER COMPANY, a Corporation,

Plaintiff,

vs.

NORTHERN IDAHO & MONTANA POWER COMPANY, a Corporation,

Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED, that this cause, coming on regularly to be heard in the March term of the above-entitled court, on Saturday, the 30th day of March, 1918, before the Court, Hon. George M. Bourquin, a jury having been waived by the parties, Messrs. Foot & McDonald, Hon. J. E. Erickson and

Hon. Henry C. Smith, appearing on behalf of the plaintiff, and B. S. Grosscup and Sidney M. Logan, Esqs., appearing on behalf of the defendant, the following testimony and none other was offered and introduced, and the following proceedings had, to wit:

**Testimony of A. L. Jordan, for Plaintiff.**

A. L. JORDAN, a witness herein, having been first duly sworn, appeared on behalf of the plaintiff and testified as follows:

Direct Examination by Mr. ERICKSON.

My name is A. L. Jordan. I reside at Columbia Falls; am president and manager of the plaintiff corporation in this case, and have been since it was organized in 1917. The A. L. Jordan Lumber Company own this property for about five years before it was burned down. The company also owned the plant and stock of lumber. We were engaged in the business of wholesaling and retailing. We were manufacturing lumber into various products, such as outside doors and window frames, and boxes of all kinds, crating, sills, mouldings, and interior finishing, and selling the same by wholesale and retail, and that was the kind of business [23] we were conducting on December *20*, 1916. On the night of that date it caught fire and burned down completely. The fire occurred between twelve o'clock midnight and one o'clock A. M., the morning of December 25th.

The main building was built in somewhat of an "L" shape, and what would be the arm of the "L" was about forty to fifty-five feet and the forming of

(Testimony of A. L. Jordan.)

the "L" portion of the mill was about twenty to thirty feet. There was a lien to on what would be the south end of the mill about 12x18.

Approximately west and a little north of the factory at a distance of about one hundred and ten feet was a little cottage; this cottage was not destroyed. I have described all the property that was destroyed and have a list of the machinery.

(List offered and marked Exhibit 1.)

(Note on this writ of error defendant offers no controversy as to the amount of damages established by plaintiff as hereinafter shown.)

(Witness continues:) Salvage received out of this stuff amounted to $241.60.

Mr. ERICKSON.—Mark this document Plaintiff's Exhibit 2.

(Document marked by reporter.)

Q. I am showing you Plaintiff's Exhibit No. 2. Will you tell the Court what it is?

A. I drew this diagram myself. The upper portion of the map shows the floor plan, and the black lines is the outline, while the red lines represent as near as memory could place it, the lighting circuit that was installed in the plant at the time. The lower portion of the map shows the south elevation view as near as I could represent it in a crude way, together with the relative position of the wires as they led into the mill supplying the power and light, coming from [24] the transformer stationed near the mill. In the left-hand corner it shows the small house I testified to. Just west of the mill is two black dots, noted as the transformer poles. This is

(Testimony of A. L. Jordan.)

a correct representation of the mill and the other objects I have detailed here to the best of my memory.

Letting the upper portion of the map represent north, the railroad tracks and the depot would be south from the location of the mill.

The wind was blowing from a northeasterly direction. There was about two feet of snow on the ground. There was some snow on the roof; I do not know how much.

Q. But it was covered, however?

A. There was snow on the roof.

When I arrived at the fire, looking at the elevation or lower portion of the prospectus here, the cupola part of the roof was all fire. This portion up here (indicating) was all afire and the roof of the whole length of the mill. The wiring entered the building on the south end. At a point A. (Indicating on Exhibit 2.) That was a power lead. The lighting circuit entered the mill at a point B (indicating on map). The transformers are indicated by the point C; the south end elevation and also at point C on the floor elevation. The lightning-arresters were within three hundred feet of the mill. I did not measure the distance exactly. The transformers were about forty-eight feet from the mill.

My last visit to the mill before the fire was about one o'clock P. M. on Sunday, the 24th. The mill was securely locked and closed. I carried one key to the door and my night watch had access to the other. When I left the mill at one o'clock, I locked and closed the building. There was not any fire in the

(Testimony of A. L. Jordan.)

stove at that time. In the working-room [25] there was a stove and one also in the filing-room. I had brick chimneys. For a foundation we had brick and a corrugated iron back around the stove, and also around the floor. Smoking around the building was absolutely prohibited. The power lead was open; that is, the light was on. The lighting system was closed; that is, the power was off. The transformers were on poles and supports leading from one pole to another. There were three transformers about twelve feet above the ground.

When I arrived at the fire that night, there were some people around there. They were running around there, but I did not take an inventory of just what everybody was doing. I was awful busy. When I got there I got the 2½-inch fire hose out of the house and connected it with the hydrant,—one is at the northeast corner of the floor plant of my mill, and proceeded to extinguish the fire to the best of my knowledge. The fire department was called and part of it got there. But it was no use. When I turned the water on and I came around the wind was blowing right over the buildings, and the dry-shed, which was full of lumber and other manufacturing stuff, and it was impossible to save the building.

*A.* Who installed these electrical appliances outside the mill?

A. The Power Company. In 1910 the installation started.

Q. Now, you may describe the installation at the time of the fire, in the interior of the mill,—that is, the installation.

(Testimony of A. L. Jordan.)

A. The wiring was all done in conduit. That is, iron pipes. We had about nineteen drops altogether. Conduit pipes are prescribed by the Board of Underwriters for the safe carrying of the wires to the various connections. I couldn't give you the composition, but it looks to me like iron. [26]

The COURT.—Do you mean that they are entirely enclosed in these pipes,—the wires?

The WITNESS.—Well, they couldn't lead right up to a motor. There is a prescribed distance to which you can lead up to a motor, but on the end of the pipe there would be the outlet of the conduit to make the connection to a motor, or a starting box or a switch, but the balance of the way it was really in this conduit. The drops were not the ordinary drop-cord. It was a special cord, prescribed by the Board of Underwriters. The mill was wired to conform to the rules of the Board of Underwriters. The Board of Underwriters are the examiners of all insurance policies, I believe, written in the state in what is called Board Companies, and they examine the conditions and various risks and report to the agents and companies as to the fire risks.

The doors leading into the portion of the mill-room connected with the resaw, was locked on the outside with a Yale lock. I have the lock with me. While the other doors were closed on the inside, and securely fastened by a hasp or hook-and-eye. They were locked when I went there Sunday morning.

The WITNESS.—Exhibit 3 is the padlock that was on the entrance at the south end of the mill where

(Testimony of A. L. Jordan.)

we passed through into the mill. I found it out in the ashes at the location of the door after the fire.

We had trouble with the lights in the mill. We had trouble with them burning out. They became crippled so that they wouldn't light. I complained to the power company about that. They furnished me with higher voltage lights. The lighting circuit was wired for 110 volts. They furnished me with lights, the cartons of which were marked 122. It [27] means 122 kilowatt,—higher than 110, 12 K. W. higher. These lights did not stand up.

Q. And then what happened?

A. Well, they were in use at the time the mill burned. The employees of the mill used light from this lighting system, also one family that was renting one of the houses. They had the same trouble with the lights that we had at the mill, and when the machinery would be running the lights would be dim, and when the power line was open and no machines were running, the lights would be very bright. And one of the houses used an electric flat-iron and that became very hot and to such an extent that they could not use it. It would get very hot two or three minutes after the current was on.

We had seven motors in that building. The leads of the motors were all marked 220 volts. We could have run them all at the same time, but we did not, very seldom. All of the machines wouldn't be in use at the same time. Each motor was on a separate switch. It was the custom to keep the mill clean. The mill wasn't dusted. Dust accumulated around the ceilings and electrical appliances more or less,

(Testimony of A. L. Jordan.)

to clean out the dust. They operated by a blowing system. That is for blowing the ordinary dust from each machine. It is sucked up to the blower. The blower itself is a large fan that revolves at high speed, and is so constructed that it gathers or sucks the dust from various machines and passes it through these fans to the opposite side or what is called the blowing part and blows it out. It operates locally at each machine where it is connected, and only draws the shavings and dust from the machine. It does not reach up to the beams and girders and joists and rafters and pick up that dust. We had no system of cleaning out that dust in the mill outside of this suction arrangement which I speak of. So that the dust had accumulated throughout all this period which I speak of.

I reside about one mile in a southerly or southeasterly direction from the mill. About 12:10, the night of the fire, [30] I was called and notified that the mill was burning. In going to the mill I had to face this terrific storm blowing from the northeast. The snow was drifted. The average depth was about two feet. It took me twelve or fifteen minutes to get to the mill. Four miles an hour is the average walking rate for a man. I arrived at the mill at about 12:25 or somewhere around there. The fire was blazing all over the mill at that time. The material was falling in all the time. I couldn't look in the windows and see any distance, it was all smoke and blazing. I had windows all along both sides. They were just ordinary windows; there might have been one or two that would slide up and down.

(Testimony of A. L. Jordan.)

Q. How often did you inspect your windows to see whether they were securely fastened, or did you ever inspect them for that purpose?

A. I was around every day. I don't remember inspecting the windows.

The drop-cords on the lamps used in the mill differed in lengths. Probably from two to five feet. The mill is one story high. The blower machine was up over the lower floor and then there was a basement where the motors were. There was a platform on which the blower and the little motor was used. The rest of the room was exposed to the rough rafters. We had a few joists across from pillar to pillar with no floor on them. There was, I believe, a plank to walk on, but they were just narrow gangways to walk on, but there was no substantial flooring other than those joists. I cannot say whether the conduits were run along over these joists. That is, those that lay right over the machine. Part of these conduits were on the rafters and part on the joists. [31]

I first noticed that the lights would get dim when the motors were in service about a year before the fire, about the time the bank of the transformers was put in. I could not give the exact date. And that was continuous every time I shut off the motors and left the lights burning,—they would brighten up; every time I coupled up the motors the lights would get dim.

*Cross*-examination.

(By Mr. ERICKSON.)

Q. You say that some changes were made on the inside with respect to motors?

(Testimony of A. L. Jordan.)

A. Yes; there were changes being made right along ever since the electric power was put in. I cannot say how long it was before the fire that changes were put in, but I presume it was within a year. When I saw this transformer on fire, oil was bubbling out and burning. The transformer was about forty-eight feet from the building. Flames extended over from the building towards the transformers. The wind was blowing from that direction. They couldn't get within twenty feet of the transformer.

Witness excused. [32]

**Testimony of William Werner, for Plaintiff.**

WILLIAM WERNER, a witness appearing on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. Erickson, and testified as follows:

My name is William Werner. I reside at Columbia Falls, Montana. On the 25th of December, 1916, I was night watchman for the Jordan Lumber Company. The fire occurred on the morning of the 25th of December, 1916. I left the building in the morning about half-past 7:00. The mill was cleaned and locked up. I carried a key. There were several doors, but only one door unlocked from the outside. The other doors were locked from the inside with hooks, etc. When I left the building on the morning of the 24th, there were some hot ashes in the stove, but no coals to speak of. There was a rule, no smoking allowed in the place.

(Testimony of William Werner.)

Cross-examination.

(By Mr. LOGAN.)

The mill was burned down when I got there at three o'clock on the morning of the fire.

(Witness excused.) [33]

**Testimony of Clarence L. McKee, for Plaintiff.**

CLARENCE L. McKEE, a witness appearing on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. Erickson, and testified as follows:

My name is Clarence L. McKee. I reside at Rexford, Montana. I am the agent of the Great Northern Railway Company at Rexford. On the 25th of December, 1916, I was employed as telegraph at Columbia Falls, for the same company. I remember the occasion of the burning of the A. L. Jordan & Company mill. I first observed the fire about 12:10 or 12:15 A. M. When I first saw it, the fire was already coming out of the roof. There was a small amount of fire in the lower part of the building, but more at the top. There wasn't much burning on the floor. It looked more like burning embers on the floor that had fallen. The mill is located practically opposite the station, across the main line. That would be north of the depot. I could not give you the train movements through Columbia Falls before the fire. It was a cold night. Wind from the northeast. There were three of us in the depot. I cannot say as to loafers, as we are bothered more or less by them, but I couldn't say as to that night. We have ejected loafers there on several occasions. The mill

(Testimony of Clarence L. McKee.)

was about a mile from town. There were no other buildings around except the depot and water tank and this saw mill, except that Mr. Jordan had a cottage and, I believe, a small hotel, managed by Mrs. Siders.

Witness excused. [34]

**Testimony of H. D. Ernest, for Plaintiff.**

H. D. ERNEST, a witness appearing on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. Erickson, and testified as follows:

My name in full is H. D. Ernest. I reside at Columbia Falls, Montana. I have resided there since December 19, 1916. I am agent for the Great Northern Railway Company. Was agent on the night of December 25, 1916. I remember the fire of the A. L. Jordan Lumber Company Mill. It occurred about 12:20 A. M. I was in bed. I was called and when I got up I went to the depot as soon as I could. As to train movements, No. 2 arrived there at 8:25, and 2d–27 at 10:25, and the Kalispell Dinky at 10:25, and No. 3, at 11:20. No. 28 reported in there about 12:40. When I arrived at the depot, as far as I could see, the roof of the building was afire. The ground and the roof of the mill was covered with snow. The wind was blowing about thirty-five miles an hour.

Witness excused. [35]

**Testimony of Miss Olive Olson, for Plaintiff.**

Miss OLIVE OLSON, a witness appearing on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. Erickson and testified as follows:

My name is Miss Olive Olson. I reside at Columbia Falls, about one hundred and ten feet from the A. L. Jordan mill. I kept house there. I used electric lights from the lighting system at the mill. I used the power there for ironing. Tried to but it was a failure, when the planer was in operation. It didn't give sufficient heat to heat the iron; and when it wasn't in operation my iron would burn up the clothing and burn up the asbestos pad underneath the iron. It would take only a few minutes for the iron to heat after the planer stopped. I do not believe it would take a minute. We lived there from September and left in February and I experienced this difficulty all the time I lived there. When the power was used for driving the machinery in the mill the lights were dim, and when the power was shut off it had the opposite effect. I was at home the day of the 24th of December. I did not notice anyone around the mill that day. Did not notice any smoke coming out of the chimneys. Had no occasion to go to the mill that day. I remember the fire. This Philips, *w*rapped at the door with a shovel and he was excited and waked us up and when I saw the fire, the flames were all flashing towards our house, and there was no lights to dress by. When I saw the fire the roof was burning.

(Testimony of Miss Olive Olson.)

Cross-examination.

(By Mr. LOGAN.)

The boy woke us up about 12:00 o'clock. I live in one of the little cottages shown on the map. It is west of the mill. There were windows on the side that faced the mill. **[36]** When I woke up I saw the flames of this fire. The light was intense. I occupied the house nearest the mill. There were windows on the side that faced the mill. I didn't notice the clock until I got to the station but it was about 1:30 when we got back home. When I looked out the whole roof of the mill was afire. I couldn't see the rest of the mill for the flames up above. The flames were all on the roof and just sweeping over towards our house and that burning involved all this side of the mill at the time when I looked out of my window here. When I looked out of my window, this whole west side of the mill was in flames.

Redirect Examination.

(By Mr. ERICKSON.)

Q. When I said that the entire west side of the building was in flames, I meant the roof. The roof, and the flames was sweeping over towards our house. I didn't say the whole building, I said the roof. The entire roof from one end of the building to the other was afire. When I would turn on the circuit to start my electric iron I would get a shock. We got a shock several times. It was quite a shock but didn't knock me down. We got shocks from turning on the globes or turning my iron on and taking the globe off and putting the iron on. When I would take

(Testimony of Miss Olive Olson.)
hold of the globe I would get a shock and when I would put on the iron I would have to take off the globe. I mean the lamp of course.

Witness excused. [37]

**Testimony of Jacob Neitzling, for Plaintiff.**

JACOB NEITZLING, a witness appearing on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. Erickson and testified as follows:

My name is Jacob Neitzling. I live at Columbia Falls. I am town marshal. I remember the fire at the A. L. Jordan Lumber Company mill. It was Christmas morning, some time after 12:00 o'clock. The alarm was turned in to the fire company. They responded and got out but were a long time getting out. I had charge. The nightman turned in the alarm. He turned in the alarm and I also got the bus team to haul the rig up there. It is a chemical rig on two wheels, and it was a long time getting there. It was snowing and windy. When we got to the fire the chemical was frozen up and we couldn't use it. We got to the fire between 12:30 and 12:45. It was all afire when we got there, the whole building. I saw Mr. Jordan there. He had a hose there. Using one of the hose. He was using it on the dry-shed. He was standing between the buildings and the transformers.

Witness excused. [38]

**Testimony of Fred Utter, for Plaintiff.**

FRED UTTER, a witness appearing on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. McDonald, and testified as follows:

My name is Fred Utter. I reside at 114 South Hoye Street, Helena. I am an electrician and have been working at the business for twenty-three years. Have been journeyman and straw boss and superintendent. I have done it all. I am slightly familiar with the premises of the Jordan Lumber Company in Columbia Falls, Montana. I had occasion to visit these premises a short time after the month of December, 1916. I made an examination, at that time, of the electrical wiring which had formerly led into the mill, particularly the lightning arresters. I saw that they were in a blistered condition. The test was made in Mr. Jordan's office. Mr. Stiles was there, and several others I do not remember.

Q. Exhibit No. 5. Do you know what that is?

A. It is a lightning-arrester. I think I took this down off the poles once. It looks something like that. Not just exactly like it. The lining of the box was damaged at that time. I think it was the same box because it was torn down across the top. The lightning-arrester is in a different condition now than it was at that time, if it is the same one. At that time you could slip a sheet of paper between the two coils. I do not know whether you could now or not. I assisted in making the test; used a two thousand volt transformer and stepped it up to two thou-

(Testimony of Fred Utter.)

sand volts. I forget just what the capacity was but it was about a 1-kilowatt transformer and we put this primarily in series with the lightning-arrester, and it sparked across from the top terminal down to the bottom. It wouldn't spark all the **[39]** way down these air gaps but it would go thru this high resistance ground here. The voltage of the primary to which this lightning-arrester was attached is approximately supposed to be about two thousand volts. Judging from my experiment with the lightning-arrester, the effect would be to create a high resistance ground on the system. I think that that ground would be in operation constantly. If the lightning-arrester were working properly, it would not be a constant ground, only when there was an overcharge, like lightning, and it might take care of high transmission, such as 13,000 volts such as they have at that time. It should discharge to the ground and then break the arc. That is the purpose of it. The resistance of the lightning-arrester should be considerable more than two thousand volts on a two thousand volt line. That is about a six thousand volt arrester, I should judge. I made an examination of the transformer on that system. It was not grounded on the secondary at that time. The ground prevents fire hazard and it would also be a great safety factor of life in connection with the circuit if there was an overcharge of electricity on there. Assuming that the secondary was carrying a voltage in the neighborhood of one hundred Ten volts, the secondary should have been grounded, and

(Testimony of Fred Utter.)

if it were not grounded, and with this lightning-arrester in the condition it was, there would be an additional hazard, from this defective lightning-arrester. The lightning-arrester would offer a high resistance ground,—that is on the one side of the primary line. The current would naturally take the least course of resistance. If there was a proper ground there would be no chance for an arc because it would go right to the ground.

Q. Will you explain to the Court, Mr. Utter, just about this charge of current in the primary, with this defective lightning-arrester, [40] and no ground on the secondary,—how it might go to ground thru the secondary?

A. All that would be necessary would be for there to be a ground,—there would be a bare place or something of that kind or a weak place where it would get to ground on the opposite side, and I should say it would be pretty near necessary for there to be a defect in the transformer, if the system worked before. It might be a ground between the first and second coil or a puncture or slight ground around the edge of the transformer, or a connection between the primary and the secondary at the transformer, that would cause the ground or a sustained arc through the primary. It is liable to cause an excessive current. It would probably run into some of the wiring and finding a weak spot some place—and create a fire hazard under the conditions of a high resistance ground.

I looked at the transformer. I do not just remem-

(Testimony of Fred Utter.)

ber its condition. The porcelain was broken on one of the transformers. One of them had been afire around the transformer and the insulation was somewhat carbonized on the outside. A carbonized insulator might offer a path of conductivity to an electric current under a very high-potential. I do not believe that the carbon would cause a short under two thousand volts. I noticed that one of the coils had been afire.

Q. Mr. Utter, suppose this state of facts to exist; On or about the 25th day of December, 1915, a mill of the plaintiff was burned; that night the weather was very cold; a strong wind was blowing from the northeast; the mill was located directly north of the tracks of the Great Northern Railway line, past which trains were going; there was about two feet of snow on the ground and snow on the roof of the mill; the floor in **[41]** the mill and the machines in the mill were clean; the switch was out on the power circuit and was closing on the lighting circuit; there had been no fire of any kind in the mill for some seventeen hours. The buildings were locked and there was no one on the inside of the building and had not been for some nine or ten hours; the mill was supplied by a power and lighting circuit from a transformer which was about forty-eight feet away from the mill. The secondary on the transformer was not grounded; the lightning-arrester was in the condition in which you have described it. From the primary there was coming a current with a voltage of about twenty-two thousand volts. The interior wiring

(Testimony of Fred Utter.)

was in steel conduits and inside the steel conduits there was insulated wire. Also there had been observed immediately previous this condition: that an electric iron attached to the lighting system in question would become red hot in a matter of seconds or probably less than a minute. The lights were burning out. What would you say as to the probable cause of the fire in the mill?

A. Well, I would believe very firmly that there was a break down in the system some place that caused an arc.

Mr. McDONALD.—You may take the witness.

Cross-examination.

(By Mr. LOGAN.)

Q. Now, Mr. Utter, with reference to this last question: We will assume that I have repeated all of the question propounded by Mr. McDonald, with the exception of that statement of his that no one had been in the building for twelve hours, and substituted in lieu of that portion of the question, these facts: That it was a sawmill and the doors were locked, and no one knew whether the windows could be opened easily or not, and [42] assuming that it was possible—it was alongside of the railroad track and it was possible for tramps to get into the building without the knowledge of the owner, during that storm, and possibly they started a fire in the stove or otherwise. Now, Mr. Utter, would you say from that state of facts that the fire was probably electrical or probably started from some other cause?

A. Well, if there is evidence that there was any-

(Testimony of Fred Utter.)

body in the building, I would think it might be started some other way, but the conditions were exactly right for a fire there. I assume from Mr. McDonald's question, if those are the facts, that every probable cause for a fire has been excluded except electricity or an electrical fire and I took into consideration his statement that nobody had been in the mill for some twelve hours prior to the fire. If, on the contrary, it was possible for anybody to have been in there, I still feel as tho that mill was set afire by electricity and you would have to show me that it was not. I got his opinion from the question on the lightning-arrester, and I am basing my answer entirely on that. If, as counsel for plaintiff say, the mill was kept perfectly clean and all wires were in conduits, there is dozens of places in a mill that a fire could start, and if it started that way, it would be all over the mill so quick you couldn't tell where it had started, and the effect would be, upon the interior wiring, to burn it up, which would take about thirty seconds. It was a high frequency current and there was no ground outside at the transformer. There was resistance in this ground. Excessive current is more apt to go by a fuse than a subnormal current. I could not say what the voltage of the lightning-arresters are. They are in the vicinity of six thousand volt arresters.

The spotting on those cylinders is caused by an arc. I do not **[43]** think it was caused by a leakage from the transmission line thru the lightning-arrester to the ground but by lightning. That light-

(Testimony of Fred Utter.)

ning stroke partially grounded the arrester. I do not mean that it was placed in a condition where it refused to carry. It was placed in a condition where it leaked, that is, carries the current to the ground when it should not. This condition might decrease the flow of the current on the wires. It would tend to intermittently decrease the flow of electricity between the lightning-arrester and the transformer. I don't think it would bother the transformer working as long as there was no other ground on the other side. That leakage in the lightning-arrester might cause an excessive current to pass thru the transformer or by it—for instance, part of the secondary might have been out of commission because of the ratio of increase.

Mr. GROSSCUP.—Q. These lightning-arresters are in the twenty-two or three hundred volt line, are they not?

A. Yes, sir. A distance of about two hundred feet before the transformer was reached.

Q. Now, then, what would have been the effect on the current as it entered the transformer on the high side, if you had taken this lightning-arrester out altogether? A. It would have been normal.

Q. In other words, it would have been the same as it entered the transformer as it would have been on the line before it reached the place where the lightning-arrester was?

It should have been; yes.

This leak in the lightning-arrester decreases intermittently the quantity of current on the side of the

(Testimony of Fred Utter.)

lightning-arrester towards the transformer.

Supposing you take off one-third of the depreciation of [44] the *this* lightning-arrester, it would depreciate one-third the current on that line. The voltage could be increased on the wire between the lightning-arrester and the transformer by reason of the defective condition of this transformer. I do not mean that the lightning-arrester would have the effect of becoming a transformer and raising the voltage.

Q. Now, then, you are passing the current over your main line, over this twenty-three hundred volt line? A. Yes.

Q. Would that exceed twenty-three hundred volts under any circumstances, at any point between the lightning-arrester and the transformer?

A. Not unless it was boosted.

Q. Now, this defect in the lightning-arrester would not have the effect of boosting it?

A. It would cause surges on that line.

*A.* How?

A. It would deteriorate the operation of the secondary winding, which was bound to occur from using that.

Q. That it would deteriorate the transformer?

A. Yes.

Q. And would boost the voltage on the line?

A. I did not say that.

Q. But that is what I am asking you. Under no circumstances would it boost the voltage on the line, beyond the transformer?

(Testimony of Fred Utter.)

A. No one said that. You understand my answer?

Q. I understand your answer that it might disturb the transformer.

A. It might disturb the transformer and might cause it to be intermittently increased.

Mr. GROSSCUP.—That is all. **[45]**

Redirect Examination.

(By Mr. McDONALD.)

I think the resistance on that transformer would be very nearly a zero ground under normal conditions. If the source of the power was boosted at the power plant it would be very near a high resistance. As to whether the voltage in the primary should become higher than the lightning-arrester would resist, there necessarily would be any current flowing thru that lightning-arrester which would then become grounded, depends greatly on other conditions, and the other conditions would then have to be present before any current of high voltage to flow the secondary, was that it might be grounded on the opposite side. It might have been an accidental occurrence or might have been a hundred different ways. If it were grounded, nearly two thousand volts would then be flowing thru the secondary. That is the same current that would be coming thru the primary wire.

Mr. McDONALD.—Q. You may explain the business of the transformer.

A. It is to reduce the current to a certain ratio; it might be 440 or 220 or 110 volts, just what is required. This is done by the ratio of turns. If wind-

(Testimony of Fred Utter.)

ing were twenty in the primary and ten in the secondary and, assuming there is no waste in heat, the ratio would be five to one. They are generally wound at the ratio of ten to one. **[46]**

### Testimony of Charles H. Stiles, for Plaintiff.

CHARLES H. STILES, a witness called on behalf of the plaintiff, having been first duly sworn was examined in chief by Mr. Erickson, and testified as follows:

My full name is Charles H. Stiles. I live at Columbia Falls. My occupation—planerman. I have been employed by Mt. A. L. Jordan Lumber Company for five years the 7th of March. I was not in its employ on the 25th of December, 1916. I was in St. Paul. I returned on New Year's morning.

My duties are to keep all the machinery up in shape and look after the tools, and the last two years it was my duty to look after all the lighting and power system and make all reports.

The lightning-arresters I should judge were close on to two hundred feet from the transformers. I made an examination of those lightning-arresters, after I returned from St. Paul. Mr. Utter was with me. We opened the box and found one of them in a crippled condition. I would say that one of them had been struck by lightning. The others looked to be in good shape. There were three of them. The lightning-arrester is composed of cylinders with air gaps in between them and there had at some time been a current over that to melt the brass cylinders, so

(Testimony of Charles H. Stiles.)

that they would touch in places.

Q. Now, then, mark this Exhibit 5.

(Document marked by the reporter.)

Q. You may look at Exhibit 5 and state what it is, if you know. (Handing to witness.)

It is a lightning-arrester. I could not swear that it was the one I examined, it is possible that it is the one on account of the pitted condition of the cylinders; it is not in the same condition as when I examined it, for the simple reason that this is the top of the box and the lightning-arrester that I examined at the time, the [47] first two cylinders were in contact. They showed signs—the lightning-arrester had been suddenly dropped and jammed, the first cylinder into the second one.

Mr. ERICKSON.—(To Counsel.) Have you any more?

Mr. LOGAN.—Yes, sir, we have five of them. Two of these lightning-arresters are from the Soldiers' Home at Columbia Falls. We have brought them all. We don't know which is which, but you can pick out any three of them you choose, and call them the ones from the Jordan Mill. That is all we can tell you.

Mr. ERICKSON.—Q. Mr. Stiles, will you look at these three and see if you can identify all, or any of these others as the ones you have tested and examined?

A. I am not positive. The one the way I had it in mind now, and I am quite clear in my mind, it seemed to be in a worse condition than this one and this seems

(Testimony of Charles H. Stiles.)

to be the worst one we have here. It seems that the first cylinder and the second one—that is the whole block had been dropped and the first cylinder had been suddenly jammed close to the second one and from there on they were equally spaced all right, but this box here shows a cylinder that is almost perfect. This cylinder here (indicating), as well as I can remember, was suddenly dropped so that it had struck the floor or some other object, and was suddenly jammed against this one so that there was no air gap between them. The third cylinder indicated that lightning had gone through it to ground. To test the lightning-arrester, we used a small transformer and put it in connection with the line on both ends, stepping 110 volts to 2,000 volts and she skipped thru and continued to work—continued to circuit. That indicated that the lightning-arrester was in bad condition. I connected the arrester to the secondary and off onto their transformer system. When it was in place, it was connected with the primary. The purpose of the arrester [48] is to take the excessive voltage to the ground. It does not necessarily have to be lightning. Any excess voltage is not liable to go to ground that way. It is more a sudden jar or runaway of the machine that would cause it. The amount of current was in the primary wire at the mill was twenty-two hundred volts. It would step down from 2200 volts to 110 and 220. We had trouble for a considerable length of time keeping the lamps going, and also fuses. The lamps were real short-lived and lasted but a very short time. At different times they

(Testimony of Charles H. Stiles.)
would get lamps from the company and some would be 110 volts, and maybe the next would be 118, and we finally got up to 122 volts at last.

Cross-examination.

(By Mr. LOGAN.)

I have been connected with Jordan Lumber Company five years. Preceding the time that I had anything to do with the installation or anything to do with the mill, the underwriters had made several inspections and I think it was the third or fourth that Mr. Jordan had received after I went to work, that he handed one of them over to me and wanted to know if I could do the work. I said that I would do the work under Mr. Mills' supervision. Mr. Mills was the electrician for the insurance underwriters. He had no connection with the Northern Idaho & Montana Power company, and as I didn't claim to be an expert electrician and wasn't taking the whole responsibility on my own shoulders, and as far as the work that I had done, it was reported satisfactory to the Board of underwriters. I had done some work. One of the first positions or pieces of work I had done was on power work. The fuse condition was in bad shape. The motors had, before my time, been changed to other and larger sizes, and the cables left to the size of the motors that were originally in there. That is, one of the duties I had to do, to take out the old cables and put [49] in other cables that would supply the motors that were installed at that time. These fuses were in bad condition. The main fuses were cartridge and knife-blade fuses. I took those

(Testimony of Charles H. Stiles.)

fuses out and ordered fuse wire according to the rating of the underwriters. That is, fuse wire that was tested, and renewed all the fuses and put them into service in their respective places. Well, I handed Mr. Jordan the order for new wire. I don't know where he ordered it.

At that time there were fuse blocks on the top of every compensator, or starting-box, that were on the walls and not protected in any way. The recommendation Mr. Mills gave men was to have cabinets made, using Federal bushings for the entrance and outlet of the wires leading to and from these respective fuse blocks. That was done on, I think, four large motors. The others were, I think, self-contained switches. I received my salary from Mr. Jordan. I went at that work at odd times under Mr. Jordan's instructions, with the supervision of Mr. Mills, afterwards.

The lighting system originally was 220 system, taken off of the main cabinet, the same as the power system. This system was made on the ceiling and rafters with an open knob and cleat work, using rosettes and common cord and sockets to complete the work. Mr. Mills condemned the whole system, and told me to take it out at an early date or in just so many words. I did so, and as I had time I went on putting this work in. I put this system in in conduit, and in fact, all the work was put in in conduit. The job wasn't completed at that time. In fact, I replaced all the old wiring that was used for lighting purposes there and put in conduit work throughout

(Testimony of Charles H. Stiles.)

the building. I did that as an employee of the Jordan Lumber Company, and under the instructions of the Jordan Lumber Company, at the advice of Mr. Mills, of the underwriters.

If it was 123 volts, I am mistaken. I testified that it was [50] 110 volts but I didn't say I was sure of it. When I changed these lamps, the largest lamp that I put in was one hundred twenty-two, that is the highest I have any recollection of. I have seen them go,—that is, some of them would not last a bit longer than some of the lower voltage lamps, and others of the 120 volts would continue to burn. There is some there from the time I went to work there, and were there at the time I left for the east; those lamps were inside the mill. I went some time in December, 1916, about ten days prior to the fire.

I put in drop-lights when I ran this conduit system around, and ran it up through these outlets. They were practically all new sockets. I do not know where they came from. I wired them up, or it was under my supervision.

Q. Now, suppose you had a two thousand volt lighting-arrester and you connected it up with a 23-horse power line, or two thousand volts, to make it exact, and connected both your terminals with a current that had been stepped down to two thousand volts, and it passed through your lightning-arrester; would you say that that lightning-arrester was then performing its function, if the current passed through?

A. It would under one condition.

Q. What is that?

(Testimony of Charles H. Stiles.)

A. If the secondary was grounded with the neutral wire—she would be doing her duty if the transformer suddenly broke down. I made a test of one of these arresters. I could not swear as to which one. It was shortly after the fire. I took this lightning-arrester down off the pole. I took it over to Mr. Jordan's office. I connected it up with the lighting system. The lighting line came from the transformer on the outside, on a pole. The office is almost due south of the mill, and the old depot that stood there at that time. I should judge it was probably four hundred and [51] fifty or five hundred feet south of the mill. That transformer wasn't any of the transformers in question. That is none of the transformers that were around the mill at the time of the fire.

I do not know what voltage I was getting through the transformer at the time I tested the lighting-arrester. More than that the transformer was marked with a ratio 2200 down to 110 and 220 volts, and if they had 110 on the primary they had 2200 on the secondary.

I stepped it up to 2200. I put through one of these boxes here 2,000 volts and she passed through, skipping as she went through from one of the cylinders to the other. I took it for granted that it was a two thousand volt lightning-arrester on that service. I am not expert enough to say whether you can safely run 2,000 volts through a one thousand arrester. My judgment is that if it will carry the load through the lightning-arrester, and that the cylinders I cannot say that the purpose is to get your excessive

(Testimony of Charles H. Stiles.)

voltage through the lightning-arrester, to ground or when the current does pass through it shows that it is performing its functions. When you apply that condition to these cylinders, it doesn't indicate that the lightning-arrester has been performng its functions and that it is carrying the current through when there has been an excessive current from lightning or otherwise. I would say that it has been hit some time with lightning and undoubtedly had performed its duty, but being left in the condition it was when I found it, I was sure that it would not perform its duty again. I saw that there had been a charge through the lightning-arrester, and that the cylinders were melted and pitted, and in a smokey condition. It led me to believe that a certain amount of current would be going through to ground at any or all time. I would say that it was hindering the service on the line. In other words, I mean that the power was not equal with these performers. You might get and probably did get 2,200 volts to the transformer at times. It [52] would be a load that would be up and down.

The lightning-arresters were between the substation at Kalispell and the transformer. And the transformers were between the lightning-arrester and the buildings. [53]

**Testimony of William L. Kimmel, for Plaintiff.**

WILLIAM L. KIMMEL, a witness appearing on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. Smith, and testified as follows:

(Testimony of William L. Kimmel.)

My name is William L. Kimmel. I reside at Spokane. Am forty-three years old. Am an electrical engineer and contractor. I graduated from Ann Arbor. Took degree in electrical engineering.

I have been installing and operating electrical plants both for ourselves,—I am in business with Mr. Nixon in Spokane, and we have been operating lighting plants for ourselves and installing them for others since the fall of 1899. I was in business for myself alone or with another partner part of the time, from 1899 to 1903 and installed the plant at Grangeville, Idaho, and operated that and sold it out in 1902, and then sold out and went in business with Mr. Nixon, and we installed the Rathburn plant for ourselves, and I think we operated that for about three years.

I have been in Columbia Falls. I never saw this Lumber Plant before it was burned. I was there in February, I believe. In 1916, if I remember rightly. That was after the fire and they hadn't cleaned up around there yet. I looked the situation over at the time and the lightning-arresters were located on a pole, west of where the transformers were located. I didn't see any transformer at that time. I saw this transformer that you speak of, I think just a few days ago, in the warehouse of the Power Company, Mr. McDonald, the General Manager was there. He said it was one of the transformers at the mill.

Q. Mr. Kimmel, I wish you would tell the Court what the function of one of these lightning-arresters is and take one of them and explain it briefly.

A. It is a piece of electrical apparatus to lead off

(Testimony of William L. Kimmel.)

lightning charges to ground, from the system. Or any other overcharge [54] or excessive voltage, and especially lightning. It is what is known as lightning protection. Immediately after the lightning charge has been led off to ground, the function of this arrester is to disrupt the arc and return the line to its normal condition. That is about all. They can be used over and over again. They should be looked after and I should say that their resistance should be examined to see that their quality wasn't destroyed and also the air gaps should be looked after. The air-gaps is the space between the brass cylinders. From my experience I should say these lightning-arresters *out* to be inspected, say, once a year any way and, if there are frequent thunderstorms probably oftener. In case of a violent storm of lightning they probably should be inspected but I don't believe we ever did it in our own case. These discolorations here (witness examines Exhibit #5) indicates that there has been quite a discharge thru the arrester. It might have been lightning or some other source of high potential. Assuming that there has been a discharge an arc would be set up between the cylinders and would cause the burning of—by arc I mean that a current passing thru a vapour or metal or carbon. In this case it would be a vapour or metal and it would jump across from there. That is a current of electricity. The effect of such a current, when bringing about an arc, upon anything that is easily ignited, would be to set it afire. I do not know the intensity of the heat of the arc but believe

(Testimony of William L. Kimmel.)

it is somewhere around three hundred or four hundred degrees. I believe the charred and pitted condition you find in Exhibit #5 on those cylinders was caused either by a lightning discharge going thru there, or a discharge from something else. As it now is, I believe that lightning-arrester will work all right, that is, it would probably perform its functions. Of course we cannot look into the inside [55] of these carbons, but I think that it would carry the current around and not interrupt the flow of the current. I cannot say that that particular lightning-arrester would leak much current in the condition it is in. It might. Assuming that Exhibit No. 5 is the one that was on that pole it was in the power company's office three or four days ago, and it was then in the same condition it is in now. I didn't climb up the pole to look at it, when it was at the plant of the Jordan Lumber Company. Supposing that these two top coils at one time were so close together that you could not put a sheet of fine paper between them, the effect upon the efficiency of the apparatus, so far as the lightning-arrester would go, that would take the lower discharge to ground, if the lightning struck the line, and it wouldn't have so far to jump. If it were in such a condition that it lacked the proper air space or air-gap to keep the line voltage from going to ground and the other side were grounded, of course, it would go to ground there and cause a short circuit. A dead short circuit would open up the post circuit or pole and pass or open up a circuit-breaker, and of course, if you had the right conditions for that, where

(Testimony of William L. Kimmel.)

that circuit was conducted, why you would get an arc. A dead short would be where two wires of opposite polarity connected directly together, or were touching each other, and remained in touch. In such case if the circuit-breaker or fuse would not blow out, of course, if the wires were too small to carry the current, they would get hot. The degree of heat would depend on how much current there was in the circuit. We have other shorts such as swinging shorts, or partial shorts, or leakages, which would result in a short. But dead short means continuous contact of two wires or conductors of opposite polarity. When I say that ground won't pass, I mean that if we had a ground on one primary wire, say a 2,200 volt wire, or 2,000 volt line, there is always a tendency for the other side to go to ground, and if [56] you had any weak point in the system it always tends to go to ground through that point. We speak of grounding as it might to go ground or it might to go ground on the frame of the transformer. It might go to earth all right, or maybe be grounded on the frame of the transformer or if it is a dynamo, on the frame of the dynamo, or on any other place that is a good conductor.

A transformer is an electrical devise made for changing from one electrical pressure to another. Either stepping it down—stepping down the voltage or stepping it up, as the case may be. I have a little diagram along here I can use. I don't mean (here witness produces document marked 6) to say that it has the appearance of a transformer, but it repre-

(Testimony of William L. Kimmel.)

sents the theory of it. From that point of view it is substantially correct. I have drawn a circle here representing the iron core of or magnetic part of the transformer, and also a square, circumscribing that and a circle representing the case, and a wire leading in and wiring around that core, and out again. That was made to represent the primary wiring. On the other side I have drawn the wire leading in and running around two turns and out again, and back into the case again, and around two more turns, and out again. I didn't pay any attention, when I drew this, to the ratio of turns in winding these and that is a very particular point.

This tap off here is what we would call a neutral wire. This diagram is for a single phase transformer. In actual practice these wires are put on next to the core, and this wire around in on top of this, and then of course, there is always the insulation between the winding and the core to prevent electrical contact between the winding and the core, or to prevent that from grounding on the core. To reduce it, this primary wire winding comes in here. That brings in the energy in case this was a step-down transformer. [57] The current comes in here and passes around this winding and sets up a magnetic induction in that iron ring which throws the magnetic flow around, in first one direction and then in the other direction. In our commerical frequency of 60-cycles, that is 60 times a second.

In this winding there would be induced an electrical motive force from that which provided an elec-

(Testimony of William L. Kimmel.)

tric pressure across these terminals, and when you connect that up to a device that consumes current like a lamp or motor, the current will flow in that circuit. The neutral wire is a tap off from the central point of this transformer. The center of the secondary wire, and by using that neutral wire and one outside wire, you have one-half the voltage across here. I couldn't exactly tell you why that is called a neutral wire. It does not neutralize any force but it has been known as a neutral wire ever since I can remember. It came down from the old Edison System where we had two wires together, and with a wire which was cut to both machines, we had the neutral wire. This wire is all insulated from the core.

The COURT.—Well, how does your electricity get out of this wire?

WITNESS.—Well, that comes in the nature of the magnetic flux, travelling back and forth through the magnetic circuit, and threading through those coils. I believe I could make you understand that better by going back to Feredith's discovery. A magnet moved in proximity to a circuit which was carrying current. At that time they had only the current made from galvanic batteried, and Feredith took a coil like that,—wire through which there was a current flowing, and accidentally happened to pass a compass along there, and he noticed at once that the magnet immediately *whippes* around. He thought about that of course and reported it to the Royal Society, and a little later he happened to think that it might be true that if he would move a magnet in

(Testimony of William L. Kimmel.)

front of the coil, it would set up a current [58] in the coil, and he found that that was the case, and so that led to the dynamo of to-day. And while there is no movement here of any magnet in front of a coil of wire, there is a magnetic motive force or flow in that iron, through those coils, and that varies from zero and up to maximum and down again, and that takes place sixty times a second, and sets up an electrode motive force there, and when you apply a load to that that will allow a current to flow here by demagnetizing the iron. I should say that this neutral wire ought to be grounded in every case. I can explain that very easily here.

On your 2200 volt side, in case you get an accidental ground and the connection between your primary and the other side of the primary and the secondary, you will then have between your secondary wiring, at all points, approximately the primary voltage. If you were to step up to turn on a light in the basement you are in grave danger. I always refuse to work in secondary work unless it is grounded. If you have a bank of transformers connected up as you have in a 3-phase circuit, it would not be possible to ground all of them, and the highest possible voltage you could get there between any points of the circuit and the ground, in case of a 220 volt, would be around 200 volts. But in a case like this where you have a 220 volt primary and a 110 secondary—I will put a ground on one of these primaries up here. Now, if you will observe, you have a ground on this primary. No connection between this ground and

(Testimony of William L. Kimmel.)

this wiring, and I stand here on the ground and touch one of these wires. We will say that I touch the lamp or socket, which is indicated with this wire here, and I would then get a voltage between the ground and that lamp of 110 volts, because this point is only 110 volts difference in potential, between that wire.

Now, in case of any accidental puncture between your transformer [59] or any connection between them,—between your primary and your secondary wire, it would put two thousand volts on this line, and if I stood there without this ground on there it is impossible to get more than what it is here.

Supposing this transformer is at the top of the pole. The wire would consist of the wire attached to the neutral on the secondary side, running down the pole. A metallic connection between the neutral or a ground pole. I would use rather a water system where we had metal or iron pipes, to make a good conductor.

To the ordinary observer it would just simply be a bare wire from the transformer to the ground, and connected to the neutral point, or if the transformer were connected up for 110 volts instead of 110 or 220, we would put it on one side of the secondary. It amounts to the same thing. From my experience in taking the illustration I have just given, I would say a failure to ground this neutral wire indicated that the installation of the transformer was very bad construction.

Mr. SMITH.—I offer Exhibit 6 in evidence. You used the word "puncture" a moment ago. What did

(Testimony of William L. Kimmel.)

you mean by a puncture in the transformer?

A. I meant by that a breakdown in the insulation, between the primary and the secondary or between the primary lead wire in the case, and back again to the lead wire in the secondary.

Q. Well, I will have to ask you for another explanation. What do you mean by a breakdown?

A. A breakdown in the transformer would be a case where the insulation had failed to hold and perform its functions.

As to how these coils and wires in this transformer themselves are insulated—the core is insulated with the usual transformer insulating material, and then the section of the secondary is wound around on there and then there is another layer put on that. [60] as Empire cloth, and I presume there is Mica cloth and Miconite,—I cannot tell you what they used in this case. Oiled cloth is commonly used and known as Empire cloth, and I presume there is Mica cloth in this also, but I am not certain. It is wound around over the secondary and then another section went over, and then this is insulated again, and then the iron is pulled up around that, and the cases are filled with oil. This square that I have indicated here is supposed to be the case. The oil is poured around these spaces so that the wires are all covered. You understand that this is simply a diagram and not a picture. But the final insulation consists in covering the entire thing over with oil. In this particular transformer, I believe there must have been about fifteen or twenty gallons of oil. I have never

(Testimony of William L. Kimmel.)

known any cause or case in my experience where the oil didn't last the life of a transformer. They occasionally put in more oil. I have seen some old second-hand transformers that have had oil in them where the compound got very thick. I have seen breakdowns in transformers that have had oil in them, and so, I should say it is possible to form a puncture through the medium of this oil.

Q. I wish you would tell the Court how a breakdown in a transformer that is entirely enclosed in a steel jacket or case can occur.

A. Between the primary and the secondary winding the insulation, I should say, in this transformer is possibly about a quarter of an inch thick. It might be a little thicker or thinner, but wherever a weak spot occurs or any other cause, and really there would have to be no excessive lead in mind, if there was a weak spot in the insulation, and the potentials were brought about, there would be a breakdown wherever that insulation was not of [61] sufficient strength to stand it. It would seek the first weak spot it could encounter. As to what might cause that condition—a stroke of lightning, which was not let off by the lightning-arrester, might cause it or it might be due to a defect in the transformer in the first place.

Q. We will eliminate that last proposition because here is a transformer that had been there quite awhile. Are you able to judge—from the testimony you have heard here and in the light of your own experience, and form an opinion as to what happened in that transformer?

(Testimony of William L. Kimmel.)

A. I have a very definite opinion as to what happened there but I don't believe I could tell you why it would happen. I am firmly of the opinion that there was a connection between the primary and the secondary winding.

Q. I will ask you to take into consideration all of the testimony you have heard in this case, assuming that you have heard it all,—and I think you have,—and tell us if you are able to your own satisfaction to form an opinion as to what caused that fire?

A. Yes, sir, I am. An electric arc in the mill is my opinion of that.

Q. Do you recall the testimony to that effect that the transformer itself was burning on the inside?

A. Yes.

Q. What importance do you attach to that, if any?

A. Well, that in my mind would lead me to believe that there was a connection between the primary and the secondary in that transformer and undoubtedly that there was an arc in the transformer and that it was in the same circuit as the other arc was.

Q. How would that set that other fire?

A. Wherever that went to ground to complete the circuit. [62]

Q. And what condition did you find to show where it might have gone to ground?

A. Where?

Q. In the mill?

A. Well, the mill burned up and I couldn't find any conditions there. I didn't see it at the time and I assumed that the mill that he had there before was

(Testimony of William L. Kimmel.)

somewhat similar to the one that he has at the present time and I have looked that over.

Q. Taking the description of that mill as you have heard it here, together with the wiring, insulated by means of metal pipe running along the joists and to the various motors and light sockets, etc., how does it come out, and what sets the mill afire?

A. The connection between the primary and secondary with a 2,000 volt circuit, would, of course, scattered throughout that mill. I believe it would be in the *in the* conduits and in the boxes and the space between the cut-outs, wherever that wire went in, whether in the lightning circuit or the power circuit, and they are never built to stand 2,200 volts or anything near that amount. I should say that somewhere between 1,500 and 2,000 volts got into the mill. Assuming that the lightning-arrester had caused the ground, I should not say that all of the primary current went in but it might have all went in. It depends on whether the lightning-arrester was a dead connection to earth. This matter of electricity is something that a man of my profession even does not understand all the mysterious workings of. We can tell what it will do under certain circumstances but cannot always tell why. Suppose that high voltage current got into the wires instead of the mill, in those metal pipes, it would take three or four seconds to heat one of those pipes so that it would set fire to a roof or joist. Whenever you get one side of your circuit connected up with a 2,000 volt line and the other side grounded, whether those [63] circuits

(Testimony of William L. Kimmel.)

may be insulated for 110 or 220 volts, you are very liable to get all of the conduit connected with that circuit, and at the point the wires are tapped off there are splices made and they are usually crowded in the pipes so that the space is pretty close and the current would very easily jump the gap into the conduit. And then wherever your conduit runs it will go into that so you would have it spread pretty well over the insulation. If the pipe should touch the blower system it would be connected up with that and if the lightning circuit should touch the power circuit you would have it from one circuit to the other, whether the power switch was open or closed. And there would be a great many places, in my estimation, where this current would go to ground and where it did go to ground through a high resistance and you would be sure to get an arc.

Q. Let me ask you: Can you eliminate the fact that the transformer was afire and still form an intelligent opinion about this fire or not?

A. I think so. But I think it would hardly be necessary for this current to set the transformer afire but the fact that it did set it afire strengthens my opinion considerably and that is the point which I think shows that it actually did occur. I mean by that that the conditions would be substantially the same altho there might not be heat enough to set the transformer afire. My judgment is that this circuit that caused the arc and set the fire, was located in the mill.

When you find one ground on a high tension wire,

(Testimony of William L. Kimmel.)

the tendency of the electric current is always to seek a path to close that circuit up, and make a short circuit. That means to seek a second ground. It means a difference of potential between the ground and the other side of the circuit, is lessened, and of course [64] the liability to go to ground is so much greater. If the distance from the other wire to the ground were very great, there would not be much of a tendency. The tendency would be to *to* to ground wherever the other of the circuit was connected, and consequently the tendency would be to go to ground through the weakest point. As it would actually go to ground in some spot, you have got a circuit there, and if there were high resistance in that circuit there would be a good deal of heat produced. If it were an arc that went across it would produce a fire, providing the materials around it were inflammable.

As to whether or not there must have been a ground somewhere between the secondary under consideration in this case, and the place where the power was generated over there. I would say that, as I understand the installation of this transmission line, that the power as generated in Big Fork was stepped down twice before it got to this place. My opinion is that there was a short circuit between one of the 2,000 volt lines that went into the transformer and there.

Q. What makes you think that?

A. Well, the transformer was described to be afire at the same time that the mill was afire, and in addition to that, there were two simultaneous fires. One in the transformer and one in the mill. That, to my

(Testimony of William L. Kimmel.)

notion, would tend to make me believe that an arc through the one caused the fire in the other. An arc through the transformer caused the fire in the mill. As to whether a ground somewhere is constantly to be apprehended and should be guarded against, I will say we always take great pains to keep our lines free from ground. Our primary lines. I think it is true of all operating companies that they try at all times to prevent a ground on primary lines. A limb of a tree, for instance, [65] suddenly touching the line overcomes that ground. It is pretty hard matter to keep the line free from ground at all times. Trees grow up and although you may trim them off, the first thing you know, they are up there again touching the wire. And they are constantly the means of getting ground. A lightning-arrester such as described to have been used in this case, I should say would be another source of an accidental ground. The grounding of the neutral, if there had been a ground on this transformer, would have made the mill safe. The maximum difference of potential you could have *toggen* into the mill with the neutral or that transformer grounded, even considering the power circuit in addition to the lightning circuit, would have been somewhere around 800 volts, possibly a little over that. That would have diminished the probability of a fire considerably, or altogether removed the possibility of a fire. High resistance ground is contact between the wire and the earth through some means that offers a very great resistance or a high resistance to pass. The current may flow through that

(Testimony of William L. Kimmel.)

but not enough of course, to disrupt the fuse or open up the circuit-breaker. I wouldn't say that that is in contradistinction to a mere spark. It may have a discharge if the wire were passing along a tree up there and it was merely touching it you might get a discharge or a little arc between the tree and the wire occasionally, when the wind whipped it around. I wouldn't call that a high resistance ground, but should the tree touch the wire and a branch come in contact with the wire, that would be a high resistance ground and the tree would not necessarily set a fire or burn *or burn* up unless there was some other path for it to get back from the ground to the opposite wire. But when it does get back, then it would set the tree a fire. If there were a high resistance ground in place of this mill and the metal insulation [66] around these pipes was a portion of that high resistance ground, we would see an arc. Unless you had a good metallic ground there. If you had a high resistance ground through the air space or along a broad surface that was adjacent to the pipe in the path between the pipe and the ground you would find your arc would be set up there. The result would be the pipe would get hot. Red hot or white heat. And if it were in connection with wood in places it would have a tendency to cause a fire. The degree to which that would heat under those circumstances is measured by the amount of force that you have got behind it. Although you can get a very high degree of heat out of a short arc. Take our arc lamp for instance and we only have a potential of about sixty

(Testimony of William L. Kimmel.)

volts btween the carbons and they produce a high degree of heat. There is this about an arc formed with a high potential, that it will travel much further and make a much hotter fire and sustains itself as a rule, longer, if the resistance is proper.

When you find the conditions as they have been described to have been in this case, I would expect to find a sustained arc at some point in the plant, wherever the conditions were favorable.

The nearest point to ground would be the point where I should say the arc would take place. However, it might take place between the winding and the conduit at one place and between the conduit and the ground in another place. I have seen a piece of pipe through which carried the current and where the current a—potential was never supposed to be on that circuit that high—where the current put on that circuit burned holes through the pipe about three inches long. Of course it was at white heat while doing so. There was an arc traveled from the wire to the conduit and from the conduit into the ground there.

This pipe that carried these wires is made of about the [67] same material as these ordinary gas-pipe. It is made of mild steel and the conduit as we call it, for electrical work is smooth on the inside and then coated with enamel and gas-pipe. I understand they don't bother to clean it out. In the operation of such a plant as this was, for the generation of electricity for lights and motive power, and such things, there is an expression called "Peak Load." It means the maximum amount of current which a certain con-

(Testimony of William L. Kimmel.)

sumer will use. That is the maximum amount of power that is drawn for any time. Usually we consider about three to five minutes,—that varies and we call it the peak load. When the people in one part of the city cease to use the power for any purpose, the effect upon the lines in use would depend on the design of the system of course. If your gas-pipes or wires are not sufficient and heavy enough to carry the load, without variation when it is on high, you get that variance of pressure. As to when we look for a big load on an electric work, on this kind of a system, I could not say when their peak is. I know in the summer-time if there is a quantity of illumination there it would be late, but their peak would be in the winter-time, but in the summer I should look for the peak around five or six o'clock. The lighting load would perhaps come on earlier in the winter, and in the summer-time the load would be later on. About five or six o'clock in the afternoon. As to peak pressure, as distinguished from peak load, there is always a certain pressure on the system, under certain conditions, but if we have a governor on the water-wheel, it will maintain that pressure. You can take into consideration line lights and such things. The peak load for a certain line in question, running from the step-down transformer would be when he had his motors in operation.

Q. Now, what have you to say as to the effect of the [68] leak in the roof of this mill, with water running down the beams or rafters or beams or anything of that kind and moistening the beams up to the

(Testimony of William L. Kimmel.)

place where this insulated wire was running along?

A. That would very much increase the tendency or decrease the resistance in the pack to the ground. Moisture is always an item which would decrease the resistance in the path of the ground. In fact, linemen will tell you that when they work on a pole which is wet, they find it pretty hard work on the pole that is wet. I mean by hard work, they get what we call a jolt when they attempt to make a splice on a line that is a 2300 pressure or higher, and there is most always one wire on a primary which will have a pressure partially ground or ground enough so that if they complete the circuit there, through the moisture on the pole they feel it so strong that it is hard work for them to work on it. And, under the condition you described, a leaky roof and wet beams in the mill, the tendency would be to leak across and it would form the other side of the ground. And supposing there was a ground somewhere between the generation pland and the transformer and you haven't a ground like the wet beams in the mill, the current would flow through there to wherever the right point was to set fire to the building. And if the neutral wire were grounded, I should say that would not happen.

I am familiar with the rules of the National Board of Fire Underwriters for electrical wiring apparatus.

Mr. SMITH.—Mark this for identification Exhibit 7.

(Document marked.)

(Testimony of William L. Kimmel.)

I have looked over Hawkins Electrical Code No. 6, and I think it is a standard work, yes.

Mr. SMITH.—Please mark it Exhibit 8.

(Document marked.)

Mr. SMITH.—I now offer in evidence note to section 14 on page 29 of the Articles of the National Board of Fire Underwriters for 1915, [69] and also paragraph 5, Alternating Current, Secondary Systems, found at the bottom of page 30, and running on to page 31.

(Handing document to counsel.)

(Which portion of Exhibit 7 was accordingly admitted in evidence, and read by counsel, as follows, to wit:)

(Reading:) Section 14. Transformers. "Where transformers are to be connected to high voltage circuits, it is necesary in many cases, for best protection to life and property, that the secondary system be permanently grounded, and provision should be made for it when the transformers are built."

Q. Mr. Kimmel, do we find a situation here that would fall under that rule? A. We do.

Mr. SMITH.—(Continuing to read.) "B." "Transformer secondaries of distributing systems (except where supplied from private industrial power or lighting plants where the primary voltage does not exceed 550 volts), must be grounded provided the maximum difference of potential between the grounded point and any other point in the circuit does not exceed 150 volts and may be grounded when the maximum difference of potential between

(Testimony of William L. Kimmel.)

the grounded point and any other point in the circuit exceeds 150 volts. In either case the following rules must be complied with:

1. The grounding must be made at the neutral point or wire, whenever a neutral point or wire is accessible.

2. Wnen no neutral point or wire is accessible, one side of the secondary circuit must be grounded.

3. The ground connection must be at the transformers or on the individual service as provided in Sections c to g, inclusive, and when transformers feed systems with a neutral wire, the neutral wire must also be grounded at least every 500 feet." [70]

Q. Do you find a situation here that would fall under that rule?

A. Yes, sir. There was an opportunity here on this transformer to provide for section 1 of that rule, that the grounding must be made at the neutral point or wire whenever the neutral point of the wire is accessible. I consider the absence of a ground on the secondary side of or lightning wire side of the transformer, a hazard to property under any and all circumstances. You always have the possibility there and probability some times that a high tension current will get into the secondary system, and of course, if they are turning on a socket in the basement or in a place where it is damp, or where they stand and touch a bathtub or something of that kind, it may complete the circuit and ground, and in the basement your secondary wiring running around it would be bound or apt to cause a path where the cur-

(Testimony of William L. Kimmel.)

rent could get to ground through a high resistance and produce a fire.

Under certain conditions the lightning-arrester in the condition, in which I saw it here Saturday, or in a defective condition—assuming that there was a defect—it could cause an excessive voltage in the transformer or increase the voltage in it. The question as I understood it was, "could the lightning-arrester raise the voltage on the transformer to which the same primary wire was connected that was connected with the lightning-arrester?" I could show you a condition under which it would. I would say under that condition, however, that it would not matter whether the lightning-arrester was defective or not. I have two ideas in my mind here. One of the lightning-arresters which I looked at here, and which has been partly identified as the one that was defective. As that lightning-arrester is now, it appears that it would perform its functions, as I said yesterday, Saturday. Now, I have also the lightning-arrester in which some of the witnesses describe the [71] air-gaps as so close that you could not put a piece of paper in between them. The resistance in that, of course the load would be on the transformer, according to the scheme I am going to picture out.

Here is a condition in which we have a transformer connected to a 2300 volt line. (Witness indicating.) Here is a 2300 volt line, and a ground here through the lightning-arrester box. This represents one side of a ten thousand volt line or a

(Testimony of William L. Kimmel.)

line with a higher voltage—I don't know just what voltage they had. A contact between that 10,000 volt line and this side of the primary here would come down here, of course, and complete the path through that, and would be high enough to do that, and in that case, that lightning-arrester there would complete the circuit through that side, and let the voltage on this transformer become almost anything up to the voltage that was on this line. Now, if that lightning-arrester were defective, the path of resistance would be a little less, and let a little more current through there. If there were no lightning-arrester on there at all, it would probably go to ground somewhere else.

I saw the transformer in the defendant company's shed. I should say it was very much the same as this outside of being a little different in dimensions, of course. The porcelain features of it, while they may not be exactly duplicates, were substantially the same as this. I saw that transformer about Thursday or Friday of last week. It was out by one of their men as being the transformer that was afire at the mill. The purpose of this piece porcelain on the outside is to insulate the low tension side of the transformer from the case; and the province of that round piece of porcelain in the middle is to prevent the wires from getting together in there. That is the wires of opposite polarity, and to [72] keep them away from the core. When these things are installed they are fastened up tight and the cover is in place on them and screwed down. The oil is

(Testimony of William L. Kimmel.)

poured right into the case. There are different practices, but we usually fill our transformers up over this terminal field here. We always cover the coil three or four inches over the coil.

(Transformer offered and admitted in evidence marked Exhibit 8.)

The WITNESS.—The insulation on the outside was broken.

Q. Now, what, in your judgment, might possibly be the effect, if there was any effect at all of breaking these pieces of porcelain here?

A. Well, that would allow a connection between the case and that wire that went though there, or any wire which went through the porcelain might come in contact with the iron. That would lessen the resistance in that circuit between the primary and secondary and it might to *to* ground through there and it would go to ground if the insulation became weak enough in between the frame and the lead in wires. If this were broken or the insulation got off these and they got together in any way that would produce a short circuit in the transformer. I cannot say just what the effect would be if there is a ground somewhere else but with a short circuit in the transformer it would probably blow a fuse of the transformer. With a short circuit on the secondary. Straight across the secondary it would always blow the fuse, providing the fuse was of the right size for it. We have had quite a number of cases where insulation would break down at this point and get into the secondary and then jump from here into the

(Testimony of William L. Kimmel.)

case. You might get a connection between the primary and the secondary in this way. There is an insulating piece between the two of them, being from one-eighth to one-quarter of an inch in thickness, depending on the size of the transformers, [73] of an inch in thickness, depending on the size of the transformers, and different voltages, and your potential is, always off one side of the line, grounded, assuming that this side was connected to earth and your secondary circuit was connected to earth, we will say, with a permanent ground. We will find that is a very good condition for it, and then if this side was grounded between this side and the secondary, you have your highest voltage. The whole voltage that is on the line would be across one side of this winding, and some point in the secondary which is adjacent to it.

If there were 2200 or 2300 volts in there you would get it. When they showed me the transformer, I think Mr. McDonald said that they rewound one section. I couldn't tell you just how long ago. That transformer has been patched up. Part of the case around here (indicating) has been broken and they put a piece of sheet iron on and riveted it to and had a new cover built. That piece (referring to Exhibit 10) is felt. I believe I could identify that piece. I was over there some time in February and at that time this piece was lying on the ground with others and I picked up and identified it at once as a part of a transformer.

(Testimony of William L. Kimmel.)

(Piece of felt introduced and admitted in evidence as Exhibit 10.)

Mr. SMITH.—Read what you find on that plate.

A. Transformer No. 958, 333, Type H, Cycle 60, form K, volts 2200, 19–80. 110–220, capacity 30 K. V. A. That indicates that the extreme end of the winding was designed for 2200 volts. That would be the primary current coming into the machine and 110 to 220 is the other side after it has been stepped down.

Cross-examination.

(By Mr. GROSSCUP.)

WITNESS.—I am one of the proprietors of a business established in [74] Spokane that design and install electrical plants. And in that connection, repair apparatus, including transformers. I went to visit Mr. Jordan's plant to see if I could sell him some motors, after the fire I sold and installed the motors he has. I have furnished him with several thousand dollars worth of electrical apparatus, at least two thousand dollars worth. At the time of about my visit, about a month after the fire I saw Mr. Jordan. We discussed the cause of the fire. I did not make up my mind as to the cause of the fire at the time, but have since. In making up my mind I have been influenced by certain facts which I have assumed to exist, as the basis upon which I made up my mind.

Q. Now, Mr. Kimmel, in determining the cause of this accident do you attach any importance whatever, as a cause for this fire, assuming that it was an

(Testimony of William L. Kimmel.)

electrical fire, to this lightning-arrester?

A. Yes, sir.

If the lightning-arrester was as I see it here, I would not say that it was a contributing cause to the fire. I would not say that it was necessarily at all, but if the lightning-arrester had not been there at all I wouldn't say.

Q. If the lightning-arrester had not been there the fire would have occurred under other conditions, as you have assumed them, just the same?

A. Some grounding on that line.

Q. Well, it is your belief that the fire would have occurred just the same if there had been no lightning-arrester there at all?

A. Well, I don't believe I could say yes, to that.

Q. Well, if the lightning-arrester, just as you have seen this, was there or if a lightning-arrester in perfect order was there, would there have been a fire just the same would there?

A. There might have been a fire. [75]

Q. Well, the probabilities of a fire would have been the same, other conditions being the same?

A. Yes, probabilities would have been there without that ground on the secondary.

Q. In other words, if the lightning-arrester was there in perfect order, then the other conditions being the same as you have assumed them, the fire would have occurred?

A. Yes. The fact that there was a defective lightning-arrester on there shows me that that wire did actually have a high resistance ground there. That

(Testimony of William L. Kimmel.)

is when I take into account the statement of the witnesses Stiles and Utter that those contacts were so close together that it was hard work to get a thin sheet of paper between them. I don't think I could say that the lightning-arrester would afford a ground, in any event you are *are* very liable to find a ground on one side or the other of the primary line. That is a connection to earth through some agency like a tree.

A ground constructed for the purpose of making a ground is a metallic contact with the wire that you are grounding and some ground plate—that is the earth you may say through the means of a ground pole or water system. We usually connect it onto a water pipe. I drive a pipe into the ground where there is moisture. Now, a high resistance would be where there was not a metallic contact. I would call the ground intended to be put in, a low resistance ground, one in which the current would flow freely into the earth or other conducting substance. The importance of a low resistance ground is to avoid the effect of a high resistance ground. Its function is to make the potential of the circuit in the secondary or low tension circuit of a certain known amount or known quantity above the potential of the earth, so that when you [76] stand on the earth and touch any part of the circuit, you know exactly what you are dealing with. The function of the low resistance ground or potential ground, is to prevent the accidental arcing such as incident to a high resistance ground. In other words, where you have a

(Testimony of William L. Kimmel.)

low resistance ground or intentional ground, you are not apt to have a flash or arcing such as is incident to a high resistance ground. If you have a low resistance ground, arcing is not likely to occur, providing a higher voltage is thrown onto the low side of the circuit. If the higher voltage—the circuit that conveys that voltage becomes metallically connected with the ground, it would carry off the current.

Q. Now, then, this rule says (*this rule says*), reading from this rule or section 14 which Judge Smith read: "The grounding must be made at a neutral point or wire, whenever a neutral point or wire is accessible.

2. When no neutral point or wire is accessible, one side of the secondary circuit must be grounded."

Now, I suppose that either one or two, paragraph 1 or 2 would obviate the result of a low resistance ground, wouldn't it?

A. Yes. I would say in this particular case, a ground on the neutral wire, or if they had that transformer connected up the other way, a ground on either wire would have done the work.

A good low resistance ground anywhere on the lightning circuit—that is, the secondary between the transformer and the ground would have obviated the danger of an arc incident to a high resistance current.

Mr. GROSSCUP.—Q. In other words, if there had been allowed resistance ground between the point of arcing—accidental arcing as you have described in your testimony in chief in the trans-

(Testimony of William L. Kimmel.)

former, that arcing would not have occurred? [77]

A. Yes. I said at a point along the ground wire it would be impossible to have an arcing. Now, wherever that circuit is completed. You asked about a current flowing through the ground wire, and that presupposes that you have got a circuit there of different potential across it. The whole circuit would be from one primary wire into the ground and across the earth and up from this ground to this neutral wire. Now, you undoubtedly would have an arcing in that other circuit. If you put two thousand volts on that secondary wire or circuit and it goes through the tubing you have a very favorable condition for an arc in the tubing and then into the ground. But in case your tubing was connected with the ground, that is the part that makes the circuit. If your two thousand volts goes into the secondary wiring, which is carried into that tubing and that tubing is of ground potential, then you have a very favorable condition for an arc in the tubing itself. I would say that the grounding of the tubing would increase the hazard rather than decrease it. I would say that every time you don't ground your secondary that would be the effect of it. In my examination in chief, I said there was such a thing as a maximum voltage in a system that is a high-peak voltage.

Q. And that high-peak voltage is reduced by putting on a load?

A. The idea I meant to convey to you was that the voltage was very often—I know it in practice—is higher than we mean to have it, and if you throw a

(Testimony of William L. Kimmel.)

big load off onto your governors cannot take care of it right away. I would say that these machines, while they are loaded or rated for 2200 volts that isn't intended to be the limit at all. It wouldn't be understood to be negligence to run 2400 volts. I would pass on 2400 volts as being perfectly safe. I would a little rather not run a 2200 transformer with [78] 2400 on it. As to whether it is bad practice, we sometimes have to do it anyway in order to get over cases where we have too much line lights, for instance, and we put a heavy load on our transformers, like a motor load or a planing-mill and that would draw our voltage down, and in that case we would boost the *the* voltage up and immediately the load is off, the voltage may pop up to 2600 volts. I wouldn't criticise this company for putting, under the conditions there at the end of the line, a current in excess of two thousand volts. I believe I would do it myself. Up to somewhere near 24,000 volts. And if that voltage ran up to the vicinity of twenty-four hundred volts, I would expect a dimming of lights when the motors were thrown on. And I would expect those lights to brighten up when the motors were thrown off. If you actually had 2400 volts on there, as the maximum voltage and you were using lights that were rated to 110 volts, and if you actually had a voltage of 2400 volts on your apparatus, the voltage on the light line would be about 220 volts. I would expect the lights, under such circumstances, to become very bright, providing you were using a 110 volt lamps. And I would ex-

(Testimony of William L. Kimmel.)

pect an iron that had been manufactured for a voltage of 110 volts to get very hot, when the motor was off. So I would not attribute to the variation of the light and heating of the iron to any disorder in the system.

If I were operating a plant and my attention were called to these variations when the motor was on and off, I believe I would tell them that it was about the best that I could do under the circumstances, without stringing considerable more copper on the line, and it would be impossible to overcome that, or perhaps I would suggest that they get a higher voltage iron. I cannot say that I would consider this as a symptom of the disorder of the **[79]** plant nor consider it of any consequence. We inspected our lightning-arrester about once a year or oftener if convenient. We inspected along in the spring and shortly after the rainy season, usually. If this lightning-arrester got into the condition that the witness Stiles yesterday claimed—with the air-gaps of the cylinders coming close together, that might have been caused by a stroke of lightning. The arcing on this particular cylinder (indicating), it doesn't seem to be as far as it is on the other cylinders and that would lead me to believe that it was pretty close to it, and so the arcing was pretty short. Taking the whole thing as it stands, I would say it had a discharge and evidently its resistance here didn't disrupt the charge. The burning seems to be excessive and even this last section seems to show considerable arcing. I have no idea, myself, as to

(Testimony of William L. Kimmel.)

when that discharge took place. That discharge might have taken place in August or September, or May or June, and it might have been more than one discharge, too. It may have taken place any time during the summer after the inspection. If they had a ground detector on the primary circuit, they would have known it pretty quick. They would have known that they had a ground there. That is if they had a ground detector for testing the ground on the primary wires, it would have shown this up. If the ground detector showed no circuit through there, that would show that there was no discharge taking place at the time they made the test. Assuming that that detector did not indicate that there was any discharge through there, and assuming that this apparatus as we see it here, was installed, I should say it would be pretty conclusive evidence that the proximity that this other witness described, did not exist, providing your ground detector was on that circuit.

Q. Now, you have assumed in the course of this discussion, **[80]** that this transformer, into which was attached the light wiring system, was burning at the time before it had been subjected to a high degree of heat from the burning of the building, have you not?

A. I don't know that is the case, but I think the probability is that there was considerable heat in there. It could have been such a fire exactly at the same time. It takes a little while to heat oil up.

Q. Well, you have assumed that Mr. Jordan saw

(Testimony of William L. Kimmel.)

this transformer heated up and burning before that heating up and burning may have been caused by the burning of the building?

A. I wouldn't hardly think it possible for the heat from the mill to do it. While it might set the pole afire right next to the transformer, I don't think it would set the transformer afire. There was an iron jacket around it, you know. I am not sure whether burned off. I don't believe it did but I believe some braces burned off and the poles fell down. I have assumed that Mr. Jordan saw this transformer burning and have probably taken that into account somewhat in attributing the fire to electrical causes. And supposing Mr. Jordan saw this transformer burning, I should say that the cause of the burning of the transformer was a breakdown inside of the transformer. I would say that would be the most probable cause and that breakdown would be attributable to a puncture of the insulating material, or of the lead wires which would be the same thing. It would be the inside of the transformer apparatus that the breakdown occurred, and I have taken that into account in assuming the cause of the fire.

I understood Mr. McDonald to say that they had replaced or reqound one coil. And I have been further confirmed in my opinion by this remark, which I understood Mr. McDonald to make. But [81] leaving that proposition out and knowing the conditions which prevailed there, by listening to the testimony on that, I would say that your conditions there were just right to produce a fire where your

(Testimony of William L. Kimmel.)

secondary wires were located.

Q. Yes, I understand. Your conditions were just right to produce a fire if you had a breaking down of your transformer.

A. Or connection between your primary and secondary wires.

Q. In other words, it all reaches out to the question of the transformer being in disorder?

A. Supposing you had a contact between the secondary wiring outside of that transformer—the secondary and the primary. There is probably a most favorable case for it to occur, as in the transformer or in the case around the transformer. If the connection between the primary and secondary wiring was outside of the transformer, then the transformer would not burn. My idea about it is that this arc did actually boil that oil and boil it over and the oil would catch afire from the heat after it got outside of the transformer.

I had a conversation with another party who saw this transformer and I think he was honest in his opinion, and that had a further influence on me. It isn't a witness who testified here. I was influenced by the statement of someone who has not testified in this case heretofore, and that helps materially in my mind in having come to the conclusion and to a small extent I was taking into account the statements I heard other than testimony, when I answered Judge Smith that from the testimony I have heard here, I have come to a conclusion. I couldn't say that I have been influenced unconsciously in this case in

(Testimony of William L. Kimmel.)

attributing this fire as an electrical fire, because there were conditions there that were helpful to making it an electrical fire, because I wasn't [82] aware of all the conditions that might cause the fire to be attributable to some other cause.

Supposing that in the lighting system in this mill there was a defect in the wiring or in the sockets, or somewhere that caused a short circuit,—that occurs sometimes. And assuming a case where a socket is out of order and causes a short circuit within the socket, and that continues for a long period of time, —several hours,—and heats the socket red hot. I have had that same experience in a case where the lightning came through and jumped down from a socket to a stove. This was in a building in Gransville, Idaho, in a hotel. The socket was on a wooden ceiling and no plaster. Wallpaper all over and even covered with grease in the kitchen. The cord in this case took fire and burned up the ceiling and went out when it got to the rosette. The rosette burned out. I think but for that particular case, I have never heard of any fire being produced. It would have to go around that rosette, and a sudden arc on a low voltage system would very likely blow the fuse. These cords consist of copper wire in the center and insulated with rubber and cotton over that in the case of a common lamp cord. That cotton and rubber is inflammable. Supposing you had heat in that socket, it would produce consequent heat in the wiring, adjacent to the socket, and that let into the socket and would communicate that heat to the rub-

(Testimony of William L. Kimmel.)

ber and melt. I hardly think there would be enough dust accumulated on a cord in a sawmill, which had been used for five years, to drop. Admitting you had 120 volts on there. Those shorts will occur in sockets and usually occur when you snap the socket, but for a fire to occur when you do not snap the socket and for a fire to occur when the thing was let alone and nobody around there burning the lights and turning the [83] lights off and on, it might happen once in ten million times.

Q. Well, suppose there were rags such as the machinists use in cleaning their machinery and allowed to accumulate in a pile in that mill, more or less exposed, to the dust, and other inflammable substances, would not that be a reasonable and fair cause for a fire, independent of anything else?

I cannot really answer that. In cold weather you don't very often get a fire. I never heard of a fire from that source in cold weather. The temperature may arise to the point in hot weather, when you have linseed oil and waste and that sort of thing.

Mr. GROSSCUP.—Now, what is the purpose, Mr. Kimmel, of making a low resistance ground between tubes in which the wires run, or conduits, as you call them, to the ground?

A. I will have to study on that just a little. I never thought of that. I am not sure that I could answer that correctly, but as I would answer it after I studied it a little, my idea about that is that providing an accidental connection between the secondary wiring that is in that pipe, occurs so as to charge

(Testimony of William L. Kimmel.)

the pipes, that condition might render it so that it would be very unpleasant for anybody that touched those pipes. That condition might run along for some time but if you had that grounded you would open the circuit right away.

Mr. GROSSCUP.—(Reading from page 64 of the Underwriters Rules, Subdivision F., and on page 65:) "Must have the metal of the conduit permanently and effectually grounded to water piping, gas-piping or other suitable grounds, provided that when connections are made to gas-piping they must be on the street side of the meter"?

A. I will answer that, yes. They have prescribed it as a necessity. In order to lessen the chance of fire and shock I should say. Fire and life hazard.

Q. Now, then, suppose that this conduit system was not [84] grounded as a low resistance ground, then the danger of fire was increased, was it not?

A. Well, I cannot say yes to that, for in my mind there is always a chance,—I can always see then a certain path for that current to produce a sustained arc with that conduit system grounded and the secondary not grounded. The conduit then is grounded and the path of the current would be through this wire, and arc across to the pipe, and I think that in case that were grounded you would have a space that you knew was there. You absolutely know it. I should say that that being the case, if you left the ground off your secondary,—if you aren't going to

(Testimony of William L. Kimmel.)

ground that secondary you better not ground the conduit.

Q. Now, if Mr. Mills, the electrical inspector of the underwriters, examined this plant at the time these conduits were put in and examined in installation there, generally, and the installation was put in there under his inspection and supervision, if he had put in a low resistance ground between these conduits and the ground—knowing that there was no low resistance ground adjacent to the transformer, he made an electrical mistake, according to my opinion. I should say that he should have seen to it that there was a ground on the secondary, as well as on the other one. I think the rules were formulated somewhere around three or four years before 1915. I cannot say as to whether, for a long period of time, up to say 1912 or 1913, the fire underwriters were, a great many of them, condemned grounding of the transformer. In 1913, I had a discussion with several engineers of the Chicago-Edison Company at that time, and the question was then not thoroughly decided. That was in 1913. The advocates for grounding a secondary wire on a lightning transformer based their argument on that point. Without that ground on a neutral transformer, you may have any potential between the [85] secondary wiring of the ground up to the limit. With the ground on the neutral wire you are absolutely certain at all times as to what you have. You know that it cannot be more than half the voltage on your transformer. There had been at that time and prior

(Testimony of William L. Kimmel.)

to that time, quite a number of deaths growing out of or occurring in basements, bathrooms and other places, due to people just touching a socket and the light would be burning and the ordinary layman would say, "Surely that socket could not have two thousand volts on it and kill a person when a light was burning," but without a ground on there on your neutral wire, I can demonstrate to you or anyone else, and presume you have seen the same thing, that a light may be burning perfectly normal, and yet there be two thousand volts between the lighting fixture and the ground, and as soon as you put on your ground, the maximum will be half the voltage at the transformer.

Q. But wasn't there practically up to 1912, a general opinion that the fire hazard was increased by grounding, while the accident hazard was decreased?

A. I will say no to that. I will say this, however: It was at least acknowledged by most engineers that it was a little harder on a transformer and there is always that tendency to break down between the secondary and primary, if one side is grounded. But if you ground the neutral that brings a little lower resistance to the transformer, and the tendency was for the transformers to fail between the primary and secondary, and they had many punctures and it was a little expensive, and I think that was the main objection to it. It couldn't possibly be considered as an increase of the fire hazard to ground.

(Testimony of William L. Kimmel.)

Redirect Examination.

(By Mr. SMITH.) **[86]**

Q. Mr. Kimmel, I wish you would explain to the Court what you started to say on cross-examination, as to the liability of a fluctuation,—that isn't quite your word, but something similar to that, in these wires, going through that conduit, in the mill, and how that might be caused and what might be the cause of it. What you call boosting up the load, I think.

A. I said this, as I remember it: On any system similar to the one that we have been discussing, the removal of the load from that system, of course, tends to raise the voltage. It holds the load down till then and then there would be a tendency for the generator to speed up and raise the voltage. Of course, the governor would take care of that if it was working right, but we would naturally expect the voltage to increase as the load was thrown off and on. That is the way I account for this flat-iron getting hot. When they didn't have any line loss present, the voltage would be more than the iron was built for.

This outside testimony that I spoke of as taking into consideration was what a gentleman by the name of Miller told me. He is one of the defendant's witnesses. I saw him in Kalispell, in Judge Erickson's office. Mr. McDonald, the manager of the Power Company, was not present. **[87]**

(Testimony of William L. Kimmel.)

WILLIAM L. KIMMEL resumed the stand for further direct examination by Mr. Smith and testified as follows:

If Mr. Mills was in charge of this wiring job, it would seem to me that he should have seen that the secondary of that transformer was grounded as well as the conduit—to see that the rules were carried out.

Q. Do you mean to say that he should have grounded the conduit system?

A. If the secondary was, but in the circumstances of the secondary not being grounded, I should not say that he should not have grounded it in that case. If the secondary was not grounded, I would have been inclined not to ground the conduit, and I think he would do the same. I would not say that it was negligent construction on his part to fail to ground the conduit system in a case where the secondary was not grounded.

Mr. GROSSCUP.—Q. Now, Mr. Kimmel, don't you know that in the rules promulgated in 1903, they prescribe that the conduits should be grounded and that it did not require that the secondary should be grounded?

A. I am not familiar with the rules of 1903.

Q. Don't you know that the rules of 1910 prescribe that the conduit should be grounded but did not require that the neutral should be grounded?

A. They might have, but I am not familiar with it. We are always members of the school that believed

(Testimony of Fred Utter.)
in grounding neutral wires and always did it. We grounded the conduits. [88]

**Testimony of Fred Utter, for Plaintiff (Recalled).**

FRED UTTER, having been previously sworn, was recalled for further examination in chief by Mr. McDonald, and testified as follows:

I have heard the testimony here in regard to the heating of the flat-iron in the house near the mill, which was supplied by the same lighting circuit and as to the burning out of the lamps in this mill. That condition in the lighting circuit would indicate to me that the voltage was abnormal to what the mill was wired for; as to the effect of a sudden supply of that abnormal voltage that was being sent through the lighting system and then being subnormal for a time and then being abnormal again—I mean intermittently—I suppose it would work the same as expansion and contraction on anything—heat and cold—which would naturally deteriorate the insulation in time. If the insulation was the same as is ordinarily in plants, the wiring that is used is prescribed by the Board of Underwriters generally as a carrying capacity of from 250 to 600 volts,—wire will stand about 600 volts normally, and naturally if the insulation deteriorates and it gets below that to a point it would probably cause a ground anywhere the wire happens to touch, or between the wires themselves and it might cause an arc.

Q. It has been shown in the evidence, Mr. Utter, that one of the coils in the transformer was defective

(Testimony of Fred Utter.)

so that it required to be rewound. Would that defect in one of the coils in the transformer cause a condition to arise in the secondary which might be a fire hazard, or produce a fire hazard, in your opinion?

A. Yes, it could, I think; there are so many ways such a condition might be produced. Excluding the condition of possible contact between the primary and secondary causing a high tension current to flow through the secondary, if there was a current in the secondary and if a portion of the secondary was grounded or [89] cut out so that it did not take up the lines of force or the magnetic field that was set up in one end of the coil, and another coil was normal, you would have a circuit where it was a two wire circuit, one wire of one voltage and one of a variable voltage. That is, there would be a difference in the voltage in the two wires. That is, if you would make it to ground. I understand that a wire runs in an iron piping or conduit; it isn't permissible to run one wire of any voltage with another. Any alternating voltage in an iron armored conduit establishes a field. The two wires of a circuit in an iron pipe has no bad effect if the current is about normal in each wire. But in the case you state, with a defective coil, which could create a condition where there would be a difference in the voltage of probably several volts in the two wires, if they both run in this pipe, each wire would establish a field of its own and they would naturally have to equalize themselves if they both ran in the pipe. Each wire would set up a field of a different density, and in

(Testimony of Fred Utter.)

equalizing you would have a condenser effect. The effect of the condenser is to fall off practically from maximum to zero and from zero to maximum. I should judge it would be the same effect—the same as expansion and contraction. This is liable to produce several effects and on the insulation it is liable to cause it to deteriorate in time.

Q. And that might cause an arc in the other case?

A. It would weaken it. I didn't examine the transformer in the warehouse of the Power Company in Kalispell last week; I looked at them casually; I noticed, I believe, that some of the porcelain tubes were cracked or broken slightly.

Cross-examination by Mr. GROSSCUP.

Q. Mr. Utter, I want to go back to your testimony of the other day. I understood you to say the other day that you personally took down this lightning-arrester, off the pole?

A. I believe I took it down. I was employed by Mr. Jordan in [90] rebuilding the mill; I cannot just remember the date I took down the box but it was some time while I was at Kalispell. The first time I was in Kalispell was when I went in to look into the proposition to see what equipment he needed, etc., and I believe that as somewhere around the 10th of January, 1917, about a month after the fire. I am not sure I examined it at that time. I was there again in March and put in the installation and conduits; I took down just one box—the one that was shot.

Q. And what wire was that?

(Testimony of Fred Utter.)

A. It was looking from the mill—it was the right-hand wire looking away from the mill. The box was fastened to the pole in some manner but I did not take it down. I took the lightning-arrester out of the box. I got the transformer with which I tested the lightning-arrester from Spokane. I don't remember who was present besides Mr. Stiles at the time I tested the lightning-arrester,—several of the fellows that worked around there; I don't remember their names.

**Testimony of Charles H. Stiles, for Plaintiff (Recalled—Cross-examination).**

CHARLES H. STILES, having been previously sworn, was recalled for further cross-examination by Mr. Grosscup, and testified as follows:

These conduits had no metallic ground to my knowledge. This was an uncompleted job. We were working on them at odd times. It was started some year or so before and I put it in as I had time. All the *the* conduits in the lighting system within the mill were not in—most of them were.

Q. You didn't then observe the rule as prescribed in Subdivsion F, Rule 28 on page 65?

The rule is: "F. Must have the metal of the conduit permanently [91] and effectually grounded to water-piping, gas-piping or other suitable grounds; provided that when connections are made to gas-piping, they must be on the street side of the meter."

That was not done?

(Testimony of Charles H. Stiles.)

A. I don't think it is necessary to ground any conduit system until the work is completed and that is the reason this had not been done.

Mr. GROSSCUP.—I desire to introduce in connection with this examination, Subdivision F of Section 28, on page 65 of the rules of the National Board of Underwriters.

The COURT.—It may be admitted.

CHARLES H. STILES, recalled for redirect examination by Mr. Erickson, testifying as follows:

I helped make the test of the lightning-arrester. I borrowed a transformer from Mr. Kimmel in Spokane, took it to Mr. Jordan's office and connected the low tension side with the plug that I took a light out of, and put the plug in for my current for the low-tension side, and I got my high-tension side from the lightning-arrester. I didn't use the transformer that was used for that mill. I also examined the lightning-arrester when it was taken out; the porcelain of the arrester was smoked and in a blackened condition. I was at the mill when these lightning-arresters were taken down by the defendant company. I don't know how many there were—probably four or five and maybe six. When they took them down there was one on the south, that is the opposite one from the one that has been described as having had a charge of lightning through it, and then the center one, and then the one [92] that was in a bad condition. I saw the men congregate around the one that was in bad condition, but they didn't pay any special attention to the others, to my knowledge.

(Testimony of Charles H. Stiles.)

I do not profess to be an expert electrician. The work I did in the mill was under Mr. Mills' supervision. He did not order me to put in a ground there; I had not intended to put in a ground; the matter was never suggested to me. [93]

**Testimony of Miss Olive Olson, for Plaintiff.**

Miss OLIVE OLSON, having been previously sworn, was recalled by Mr. Erickson for further examination in chief, and testified as follows:

I have used the iron I referred to in my testimony at other places. At our home in Whitefish and I used it in St. Louis, after that. I didn't experience the same difficulty with it I had at Columbia Falls.

Witness excused.

Mr. ERICKSON.—That is all; we rest.

And thereupon the plaintiff rested his case in chief.

**Testimony of Arthur Mosby, for Defendant.**

ARTHUR MOSBY, a witness appearing on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Logan, and testified as follows:

I reside at Kalispell. Am an electrician. Have had practical experience in electrical work since 1905. I run an independent shop and furnish electrical equipment and do wiring, sell lamps, fixtures, etc.

In the latter part of January, 1917, I had occasion to examine and repair transformers for the Northern Idaho & Montana Power Company. Mr. Grant called me over and said they had use for one of the

(Testimony of Arthur Mosby.)

large 30–K. W. transformers that had come from the Jordan Company mill at Columbia Falls and he was to use this at Whitefish, Montana, and wanted me to come over and then we had a talk about the best transformer in the lot to use up there. I picked out the transformer at that time. That was a 30–K. W. After we selected the transformer we tested it out. We took one of the similar transformers [**94**] somewhat larger than that, and on the same style, that we knew was in good shape and tested out the windings of the best looking transformer. We used two thousand volts, and stepped that down to 110 through the transformer. I didn't find any defect in the transformer at all. I examined the windings of the transformer and didn't find any defects. To determine whether the transformer was performing its functions or not we tested to make sure that there was no connection between the primary and secondary, and between the primary and the laminations, and no connection between the secondary wiring and laminations. We found no leakage from the high-voltage side to the low-voltage side by any of these tests or examinations which we made. The transformer was in first-class condition. I didn't pay any particular attention to the case, because they were all out of the cases at the time. I made no repairs on the first transformer at all. There were two other transformers there that we made tests on and looked over, but the porcelain block such as you see in the top there, was broken in the other two. I saw the iron case over at Ernest Schafner's place. They had been

(Testimony of Arthur Mosby.)

broken. That break in the porcelain block was a new break and was, in my judgment, the result of the fall from the posts. There was nothing there to indicate a fusing of any copper wires or anything else to indicate a flow of electricity—an excessive flow from the high-voltage side to the low-voltage side. The break was purely mechanical, the natural result of the fall. If it had been caused by a defect in the operation of the transformer on the pole there would have been a copper deposit on the porcelain itself, it would have been fused right into the porcelain. **[95]** That was the second transformer I examined.

Q. What repairs did you make on that?

A. Well, the supporting post like this piece, in the other transformer, when the other transformer fell, it must have fallen upside down, and it was broken off here. (Indicating.) It was bound to drive this out and these parts were broken and so we had to make some other kind of an arrangement to hold the transformer in its case, and then we substituted a hardwood block for the block that was in it, and we had to straighten out these leads. They were bent. And we had to retap them.

Assuming that these wires here were connected the high-voltage side,—the leads into the transformer, of the high-voltage current, and these on that side (indicating), connect the low-voltage side, there was nothing to indicate that there had been a breaking down or wearing away of the insulation or anything that would have permitted the current to flow from this side of the transformer, through the transformer case

(Testimony of Arthur Mosby.)

to the other side, that is from the high to the low-voltage side of the transformer. There was no indication of any weakening whatever on the inside of the transformer. The only other repairs I did was on the leads such as putting in new leads, after I had substituted the wooden plug. Before I made any repairs at all I sent the current through it to determine whether there was any leakage there or not. When I first made the test, before I made the repairs I used two thousand volts, and the other two transformers that were left, were sent over to the shop in March, later, and I tested those at four thousand volts.

Q. Now, we have the third transformer. You have testified as to two. And the third transformer came to your shop with the second? [96]

A. Yes. The third was a twenty-five or a thirty K. W. same as the others. All of same size. In the third transformer, the porcelain block was broken in it as in the second and the leads had been pulled off of the coils, and this same supporting block here was broken. (Witness indicating.) That is the leads here, where they fasten on the inside to the coils. They were all practically torn from the tapping in the holes. They were broken either by the fall from the poles or in rough handling afterwards. There was no fusing or anything to indicate that an excessive voltage had passed from one side to the other.

Q. Now, what repairs did you make on that third transformer, if any?

A. Well, in order to tie these leads down, we had to take the laminations off the transformer to get at

(Testimony of Arthur Mosby.)

the coils to retape them up and I had a man working there for me to take the laminations off, and then I took the coil out and he put the laminations back on again, and he helped me tape up the leads, and put the wooden block in. When I say taped, I mean I taped the leads. I didn't rewind the transformer.

Q. What was the condition of the windings on the transformer?

A. Well, on this last one it was skinned up. It looked as if it were the result of a fall. It had been scraped,—it wasn't an electrical cause. If that abrasion had been caused by electricity, the copper wires would have been pitted, either that or burned off completely and I didn't find that condition there. As to this third transformer before we started to make any repairs I tested it at two thousand volts. In my opinion there was no breakdown [97] or weakening in any one of these transformers, prior to my examination. There was nothing to indicate there might have been a weakening. There apparently was no puncture in the insulation between the coils. With the tests which I made, had there been a puncture in the insulation between the coils, there would have been a leakage made apparent at that time. It would have short circuited, and you could have told it very easily. I was assisted in this work by Fred Modesette. I am the only one in Kalispell that does this repair work. As to the leads inside of the transformer, they were still in the transformers. They had been, of course, ripped out of the case and there was no connection. We could have used the

(Testimony of Arthur Mosby.)

same leads if they were longer, but they had burned off from the outside, as a result of the fire they were in. If you take this lead out of the transformer you could see where they had gone through the porcelain bushing, and it showed that there was no fire in the case, but it showed that there had been a fire on the outside of the case, because it wasn't an electrical burn it was caused, in my opinion, by the fire of the burning mill.

Cross-examination.

(By Mr. McDONALD.)

Q. Mr. Mosby, examine that piece of iron on the floor. Do you know what that is?

A. Yes, sir. This is the inside. (Indicating.) I cannot tell whether it shows indications of burning on the inside, or fire. It doesn't smell like that was burned. On the outside it looks as if it got very hot. If it got pretty hot on the outside it might get hot on the inside but it doesn't smell like it was charred and doesn't show any indication of fire on the inside. [98] I am running an independent shop and do interior wiring. The power company at Kalispell hasn't done any interior wiring for some time. I do work for them such as wiring their transformers. I saw no evidence of leakage in the coils and the wires, and if there had been I would have observed the fused copper. It is necessary to make a test because you cannot always tell. If there was a leak between the secondary and primary coil, the primary being in between the two, you couldn't tell, and you would have to test it to find out. We made no test between the

(Testimony of Arthur Mosby.)

primary and the case. We made a test between the primary and the iron on the transformer, and if there was any connection between the primary and the case, there would also be a connection between the primary and the laminations. When I said the wires were burned off, I meant the insulation was burned from the wire.

Q. Now, suppose there had been a defect in the insulation of your primary at this point, where it enters the case, and another defect at the point where the secondary leaves the transformer; that is, there might have been a connection between the primary and the secondary through the case, that would not be apparent by an examination of the laminations of the coil?

A. Well, we wouldn't examine the laminations of the coil for a defect like that, we would examine the leads. If there was a leakage between this lead and these, the insulation would have to be punctured for that to leak, and we could tell that with the naked eye. If the leak were up under this porcelain we could tell with the naked eye. If it was punctured there it would leave its impression there just the same as if you took a knife [99] and skinned off the insulation. We made no test with the case at all because it wasn't necessary. I said that the insulation was scraped on one of the coils. When I said it was caused by the fall, it was merely a conclusion I arrived at from the fact that the transformer probably fell. The scraping had nothing to do with the electrical part of the transformer for that part. We

(Testimony of Arthur Mosby.)

could have left it as it was and it would have operated. We did not re-wind anything. We just retaped it. I said that in no case was there any discoloration that would show a burning inside of the transformer. There was no discoloration of the porcelain plate, except that it was smeared with dirty oil. The porcelain was broken in a hundred pieces, just as if you would strike it with a hammer. You could see that every crack was clean as a whistle. We made the test for the purpose of finding out to what extent they were damaged. They wanted to see which was the best transformer of the lot to use. I didn't know that Mr. Jordan was going to sue. And it was not my purpose to get evidence for this trial. I examined the taping to determine whether or not any of it had been burned on the inside of the transformer. I heard the testimony of Mr. Stiles and Mr. Utter that the taping was so burned that they could peal it off easily. You could scrape it off with a knife but it wasn't burned.

Q. Could you scrape that off with your fingers?

A. Well, you might get a good hold of it and pull it off. It wasn't charred, though. I was making the examination for the purpose of getting it in shape to work again. Setting it up in A–1 condition. In making the test we took a pair of small ones and hooked up 110 volts and paired them up this way (indicating) and that was so as to give two thousand volts on the outside. To make sure [100] that the transformers were in working condition and that they were getting two thousand volts on the outside. We

(Testimony of Arthur Mosby.)

rigged up a bank of lamps of 110 volts, and if they burned with brilliancy they had two thousand, and I paired them up and then I ran across a fuse wire on the outside and through the circuit so that I had four thousand volts on the outside. Then I took one of the leads from this bank of transformers and turned the current on and then I tested this side with both these coils. And then they showed clearly that there was no current between this side and that side. There was an electrical defect. I opened the switch when I made my connections here. Then I made a test from the high side to the ground. We hooked it on the laminations and tested it between the high side and the ground and that showed clear, and then we tested from the low side to the ground, and that showed clear and so we knew that the transformer was all right.

Q. Did you use as a lead one of the wires that had originally been in the transformer?

A. That is, we didn't make any changes in the wiring or the transformer at all. Just fixed it direct, you understand, and we watched the leads and kept them separated so there would be no danger of showing a short between the lead and the case, and then we hooked onto the leads that were on there and on the leads on the side. These leads were still on there. We were careful, however, to keep the leads separated because, if they came together it would be short. This porcelain being gone, of course, I had no means of testing this transformer in the condition in which it was when first found without some other mechani-

(Testimony of Arthur Mosby.)

cal device to separate [101] the leads because the transformer block was broken. When I bridged the terminal of the secondary coil with the testing wire here, I had no means of knowing whether a spark actually passed from this testing wire or not. If there had been any leakage at all it would have blown the fuse. When I got through with my test I turned it over and one of the outside coils was battered on the bottom and the leads were fully as much, and I told Mr. Modesitt to take out the laminations. The coil was damaged on the outside. Before that, we didn't connect our testing wire after we were through with our operation on the transformer. We disconnected those after we got through. We didn't short the testing wire and blow the fuse. We knew that the fuse was not in working order between the transformers. We knew that the fuse would have blown because of the transformers. We knew that the fuse would blow by a short through the transformer, it couldn't help but blow. Fuses do not blow on a dead short.

Q. You know fuses are commonly defective. I don't mean all fuses are defective, but it is a very common thing to find a defective fuse?

A. I never found such a condition. I never found one that failed to blow yet, and I have had considerable experience to, and I never found one that failed to blow.

Redirect Examination.

(By Mr. LOGAN.)

There wasn't anything on that lead to indicate an

(Testimony of Arthur Mosby.)
abrasion or weakening of the insulation that would carry the current of the transformer into the case.

Recross-examination.

(By Mr. McDONALD.) [102]
The test was made in March, 1917.

Witness excused.

**Testimony of Frank Modesitt, for Defendant.**

FRANK MODESITT, a witness appearing on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Logan, and testified as follows:

My name is Frank Modesitt. I was in the employ of Mr. Mosby in January and February and March, 1917. I helped Mr. Mosby to overlook and examine some transformers in January, 1917. Those transformers were sent there by the Northern Idaho & Montana Power Company. Mr. Mosby did not do any rewinding of the coils on those transformers or any of them.

Q. What was the nature of the work he did?

A. These leads here were all broken. This porcelain, I think on both of them, and these leads were all bent together, and so that we took these leads and straightened them up and then Mr. Mosby made a test on the transformer and after he made a test he had me tape all these leads here and shellac them. I didn't do any winding on the coils.

Witness excused. [103]

**Testimony of A. J. Grant, for Defendant.**

A. J. GRANT, a witness appearing on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Logan and testified as follows:

My name is A. J. Grant. I have been an employee of the Northern Idaho & Montana Power Company since June, 1910. I am familiar with the work of the company. It is my line of work. I installed the transformers in 1914 on the A. L. Jordan Company mill job. I installed three 30–K. W. transformers. It is the only bank of three of that size that I know of. I think that Mr. Ball took down the transformers after the fire. I saw them when they were sent to Mr. Mosby for examination. The transformers that Mr. Mosby overhauled were the same transformers that were *en banc* there at the Jordan company mill at the time of the fire. I was present when he examined them and tested them. That was a week or maybe a little better after we got them from Columbia Falls. At the time I was there he made the test of 2,200 volts. One of the transformers was badly shattered from the fall but so far as the burns or anything of that kind were concerned it was not in bad condition. I could see no evidence of electrical burns. I think we tested all three at that time. I know where those transformers are now. One is serving the roundhouse at Whitefish. I installed it. Another is operating on the east side of Kalispell for electric stoves and lights, and the other one is in the wire room in Kalispell. We have had no trouble with their working, either of them.

(Testimony of A. J. Grant.)

I took down the three lightning-arresters. They were on pole back from the transformer at the Jordan Lumber Company mill. I also took down two at the Soldiers' [104] Home two weeks later. These five lightning-arresters in the courtroom now are, to the best of my recollection, I am almost sure of it, the five I took from the Soldiers' Home and from the Jordan Mill. As I took them down I took them to our little store at Columbia Falls. I am sure that three of these lightning-arresters are the ones that were at the Jordan Lumber Company mill. I took them down about the first of April or the last of March in 1917. When I took them down I opened the three and looked at them. I didn't test them; I just looked them over. They looked in pretty good condition. I am almost certain they are in the same condition now as when I took them down. I didn't notice that any of the brass cylinders in any of those lightning-arresters came in closer contact than they do now. These lightning-arresters remained in the little storeroom at Columbia Falls until a few days before the trial. There was no repairman at Columbia Falls. We brought them down to Kalispell to bring over here. I look after the line work, mostly all of it, and the placing of such equipment as lightning-arresters would be my work. If a lightning-arrester was to be repaired, I would know of it. I generally do. As to why these lightning-arresters were taken down, we took them down and replaced them by Westinghouse by a General Electric. We did not take any of these lightning-arresters down

(Testimony of A. J. Grant.)

because they didn't perform their functions. I wired the transformer there at the Jordan Mill.

Q. Now, Mr. Grant, look at Exhibit 11.

A. That is a general plan of the sawmill up there, and the railroad tracks. These lines indicate the railroad. The mill is opposite the depot across the tracks. This little section here in the northwest, indicates what were [105] the poles,—this cross. That indicates the transformers, and their connections I sketched the transformer and Mr. March, the city engineer drew that plan. But those transformers were connected up according to that diagram. I did the connecting, with the help of some ground men and helpers I had.

Cross-examination.

(By Mr. SMITH.)

As to where the particular transformer that this piece of iron came from, I cannot say for sure but I think it was in the wareroom at Kalispell. It has not yet been reinstalled. I wasn't directed by anybody to bring it here to the trial.

Witness excused. [106]

**Testimony of W. B. McDonald, for Defendant.**

W. B. McDONALD, a witness appearing on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Logan, and testified as follows:

I was local manager of the Northern Idaho & Montana Power Company, Kalispell, from 1910. I have heard the testimony of Mr. Kimmel to the effect that

(Testimony of W. B. McDonald.)

when he went over to examine the transformer a few days before the trial that I was present and said that the transformer had been re-wound. I had no conversation with him to the effect that the transformer was re-wound. I said that the leads from the coils was damaged and it was fixed by Mr. Mosby, and if he wanted any information he could go to Mosby and he could probably tell him more about it than I could. I voluntarily permitted these people to have access to our plant and to refer to this equipment and the transformers I had on hand, and told them where the other transformers were, and gave them all the information they asked for.

Cross-examination.

(By Mr. McDONALD.)

Q. Mr. McDonald, don't you think that you might have said at that time that one coil was re-wound?

A. No, there is a misunderstanding there. I said, the terminals of the coils, that they were damaged. I remember the occasion of last Thursday in the city of Kalispell, there being present myself, Judge Erickson, Grant, Utter, Mr. Stiles, Mr. Kimmel and there was something said about the transformers because we took the cover off so you could see the coils there. I didn't say then that Mosby re-wound those coils. There was a conversation about coils, I remember that distinctly but [107] the conversation in substance to the effect that one of those coils was re-wound by Mosby did not take place.

Q. Do you know, of your own knowledge, whether or not one of those coils was re-wound?

(Testimony of W. B. McDonald.)

A. No, sir, there was none of those coils re-wound, because I inquired. I always ask when we have transformers where we have any trouble. There was a question about the transformers at this time. I asked the condition they were in and he told me that the casings were pretty well broken, and I asked if the coils were burned, and he said no. I said if there was anything with reference to the coils, Mr. Mosby would know.

Redirect Examination.

(By Mr. LOGAN.)

I said that the leads from the coils was fixed, because I knew the leads had new wire put on. I said something about there being re-taped at that time, because there *was the* insulation wore off, or bruised on the outside of the coils of the transformers and that was, of course, fixed and replaced.

Witness excused. [108]

**Testimony of Pete Boyle, for Defendant.**

PETE BOYLE, a witness appearing on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Logan and testified as follows:

My name is Pete Boyle. I am an employee of Mountain States Power Company. I went to Columbia Falls after the Jordan fire to look after the company's equipment there. I went there the day of the fire in the afternoon, Christmas Day. I cut off the primary wires there. They were handing pretty low around the cottages and I cut them off and came

(Testimony of Pete Boyle.)

back to Kalispell. I cut them off from the cottages about a hundred feet from the transformer poles. The transformer poles were thirty-five feet high. Thirty-five feet long, that is twenty-nine feet out of ground. The primary wires were tangled on this pole here (indicating). That is back where these lightning-arresters were about one hundred twenty feet west of the mill. I cut them off and fastened them up as high as I could reach. I looked at the transformers that were lying on the ground. The north pole was burned pretty bad. I guess about eight feet of it burned off the top, and I don't remember whether this was all burned down or not. Maybe ten or fifteen feet sticking out of the ground. But the transformers had fallen to the ground. The transformers were about eighteen feet above the ground before they fell. When I saw them, one of them had fallen top down. It was upside down and the other two—the second one the top was broken, but the third the top was all right, but the top was broken on the one upside down. That is the top cover The third one was practically intact. Some of the porcelain tubes were burned. I think one transformer was all right. That is the secondary. It was [109] all one block of coils in one. I looked after the removal of these transformers. I picked them up and went over the following day and cleared up the primaries of the first pole from the transformer, and I took it over to the shed about forty feet away. I came back about ten days afterwards and had them shipped to Kalispell. That was on the 4th of January. The third

(Testimony of Pete Boyle.)

transformer, which is now in the warehouse, has not been put in service for the reason that we have had no use for it. We have had no use for one that size. It is a 30–K. W. transformer. The company has no other 30–K. W. transformers, except these three, at this time. Nor any others since the fire.

Cross-examination.

(By Mr. SMITH.)

We did not have any particular place to put this 30–K. W. transformer. The transformer now in the warehouse in Kalispell was installed on that pole at the Jordan Lumber Company plant in February 1914.

Witness excused. [110]

**Testimony of Carl Miller, for Defendant.**

CARL MILLER, a witness appearing on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Logan, and testified as follows:

My name in full is Carl Miller. I reside in Troy. I was in Columbia Falls on Christmas Day, 1916. I was in the employ of the Barrabee Electrical Company of Kalispell. The Barrabee Electrical Company sells electrical equipment and wiring, fixtures, etc. I happened to be in the Gaylord Hotel in Columbia Falls the night of the fire and shortly after the news there was a fire, the lights went out and I called Kalispell to get Mr. Grant and Boyl, because I had an idea of the trouble and what it was, and the operator got hold of Mr. Grant and Mr. Grant was

(Testimony of Carl Miller.)

evidently on his way from the hotel over to the Power station when I called, and so I went up to the fire and told the operator when she got Mr. Grant to have him call me up there. So, at the time I got to the station he called up and I *golt* hold of him and he told me to go ahead and clear the wire so he could put the switch in. I got to the depot about 12:30 o'clock. The hotel is about a mile from the mill. When I got there, the building was on fire and there was an awful wind coming from the fire and the flames were coming towards the transformer poles. I did not go very close to the transformer poles. The wires were hanging down close enough for me to reach them and I cut them. The wires were hanging down at the pole where the lightning-arresters were, about one pole from the transformer pole. The wires were sagging down. I didn't notice the cause of the sagging unless the top cross-arm had burned down. When I found the primary wires were sagging, I cut them off and tried to fasten them on the next pole the best I could to [111] clear them. They were dead at that time. I then informed Mr. Grant that I had cleared the wires. The current was put on and the lights came on again in town. I did not notice any unusual condition around the transformers that night. I don't know how close I got to them, I don't suppose I got within forty or fifty feet of them. It was very warm there with the flames blowing toward that way. I did not see Mr. Jordan there at that time.

(Testimony of Carl Miller.)

Cross-examination.

(By Mr. ERICKSON.)

I do not know who I saw at the fire when I first got there. There were several men around there but I didn't know any of them. I saw Mr. Jordan but I don't remember seeing Mr. Jordan right when I first got to the fire. The fire had been burning probably forty or fifty minutes when I got there. I do not think I saw Mr. Jordan with the hose trying to put out the fire. I saw him at the fire but I don't remember seeing him with the hose. When I went down there the whole west side of the building was burned. When I got down there I didn't notice any fire in the transformer. The poles were burning. I didn't examine the transformers particularly. I was in your office last Thursday. I didn't say there in the presence of Mr. McDonald, Mr. Kimmel and Mr. Utter and yourself that the transformer was afire. I said that the poles were burning and I couldn't say whether the transformer was burning or not.

Witness excused. [112]

**Testimony of M. E. Thomas, for Defendant.**

M. E. THOMAS, a witness appearing on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Logan, and testified as follows:

I have seen this lightning-arrester before. I saw them the first time when I went up to Columbia Falls to reconstruct, on March 21st, 1917. I went with Mr. Grant. I assisted Mr. Grant in removing these ar-

(Testimony of M. E. Thomas.)

resters from the poles there at the Jordan mill. We opened them all as we took them down. Mr. Grant done the work. We had two helpers there. I noticed nothing in particular the matter with these lightning-arresters except they had received a jolt of lightning some time prior to that, which is a common occurrence in lightning-arresters. I do not recall this particular lightning-arrester. If it is one of the lightning-arresters that I saw that day, it isn't any different now than it was then, to my knowledge. I did not notice that in any of the lightning-arresters we took down that day that there were any cylinders in closer contact than they are here, now. We took down three from the Jordan Lumber Company mill and two from the Soldiers' Home, and we put them in a little shed at the substation at Columbia Falls and left them there. The last two were taken out about a week ago Monday or Tuesday. They were taken to Kalispell. They were two out of the five here. The other three were taken by Mr. Grant.

Cross-examination.

(By Mr. McDONALD.)

The arresters were brought down to Kalispell explicity to be used at this trial. I took them down about a week ago Tuesday. The two taken down from the Soldiers' Home [113] were replaced with Westinghouse, and the ones taken down from the Jordan mill were replaced with Westinghouse at the new mill. It has been at least a year since these arresters were taken down. We did not take them down for the purpose of using them in this trial. My

(Testimony of M. E. Thomas.)

interest in these arresters was merely casual, and when we replaced them with Westinghouse we had no idea whether they would be used again. I didn't make any identification of the arresters. I helped put them in the small warehouse and never saw them since until they were brought over here for this trial. I don't know as I can say how many of them were struck by lightning. That is a fact that can be seen in any lightning-arrester that has been in service for a number of years. They were somewhat pitted.

Mr. LOGAN.—We will offer this map to get reference to the diagrams of the transformers themselves, without reference to the buildings.

COURT.—Very well.

Witness excused. [114]

**Testimony of B. H. Clingerman, for Defendant.**

B. H. CLINGERMAN, a witness appearing on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Grosscup, and testified as follows:

A. I was the assistant general manager of the Northern Idaho and Montana Power Company on Christmas, 1916, and for some time before that. I am a graduate electrical engineer of the Massachusetts Institute of Technology. I was graduated in 1904. I have been engaged almost wholly in work connected with the operation of public utilities, mostly under two large operating companies—J. G. White and Company of New York and London, and H. B. Billsby of Chicago and London. My first

(Testimony of B. H. Clingerman.)

work for J. G. White and Company was in Youngstown, on electric railway construction, and then in Wilkes-Barre, Pennslyvania, where I had to do with about 35 lines in connection with the distribution of electric energy. Since leaving White and Company—aside from some work for the Applegard system of electric railways, and the People's Heat, Light and Power Company of Springfield, where I was employed by Billsby of Chicago, I was employed by Billsby of Chicago, at Mobile, Alabama, about seven years, and then in Tacoma, Washington, in connection with the Northwestern Idaho Montana Company. Billsby and Company and J. G. White both specialize in electrical engineering. I have been here throughout this hearing and heard all the testimony.

Q. It is charged here that the Jordan mill was burned from electrical causes. The fact that the mill burned is undisputed. Now, it has been testified here that some time prior to the fire, and from the date that the three transformers were installed at the mill in February, 1914, there was a fluctuation of the lights and also a fluctuation of the intensity of heat with which the iron in one of the cottages was heated. You may explain to the [115] Court, the cause of such fluctuation, and state whether or not you know to what that should be attributed.

A. I can explain the situation which is more or less usual, by using a comparison. If you turn on the faucet in a dwelling-house you get a pretty good pressure of water, but if you turn on all the faucets

(Testimony of B. H. Clingerman.)

and take a considerable quantity of water from them your pressure is not so good. In this particular case, the company had three transformers connected together, as we say *en banc,* to provide the proper kind of current for the operation of the motors. A three-phase current. From one of those transformers a tap was taken off so as to supply to the mill current at the proper voltage for lighting. Now, when all the motors or many of them were in service for the mill, there was what we call a drop in the transformers. Ordinarily that drop may be from two to five per cent or thereabouts, but there is always some drop. Now, the lights burning on the lighting circuit would burn with dimness or brightness, relatively speaking, in accordance with whether or not the motors were being used. I should not think that the fact that these lights were dim when the motors were being used, or in use, indicated any derangement or disorder of the system, or improper construction of the system. It is quite common in electrical plants for lights and irons to operate in the method testified to in this case. A lady has testified here, a Miss Olson, that her flat-iron became excessively hot,—hotter than when she used it some other place. Electrica Flat-irons are manufactured usually at a rating of 110 volts, on circuits having a nominal voltage of 110 volts, but they are also manufactured with a nominal voltage of 120 volts, and in those cases where public utilities are operating at 120 volts, customers can get better service by using a 120-volt iron. If 120 volts were supplied to [116] a volt iron, it would get hot quite rapidly.

(Testimony of B. H. Clingerman.)

The voltage supplied by the lighting line at the Jordan mill was somewhere around 110 to 125 volts. That ought to cover the conditions. Possibly a little less than 110 if the wiring was light. There is a drop in the transformer and a drop in the wires to the building, and there is a drop inside of the building, that all enter into consideration. These transformers are marked here for 2200–1980–110 and 220 volts and are constructed so that they will take a higher voltage without injury. It is quite usual to find public utilities using 3500 on a 2200 volt line. The object of using a higher voltage is to compensate for line drop between the power plants. I have examined the Kalispell plant in connection with my supervision. The voltage supplied to the Jordan mill, normally, was 2200. By that I mean a voltage anywhere between 2200 and 2400. The fact that we had this fluctuation would not indicate an abnormal condition.

Q. Now, there has been a great deal of talk about these lightning-arresters. Supposing that one of these lightning-arresters did have one, two or three cylinders so placed that they were in closer contact than they appeared to be here, at this time, what would have been the effect on the system?

A. It would have decreased the resistance by which lightning would have to pass to ground.

Q. Well, suppose that this accident or fire is in no way attributable to lightning, what effect would it have towards causing a fire at the mill?

A. I should say that if the fire was an electrical

(Testimony of B. H. Clingerman.)

fire, it probably would have happened whether or not the lightning-arresters were there or not, and it would make no difference whether the lightning-arrester was in the sort of order that Mr. Utter described [117] it, or in its present order. In other words, the condition of that lightning-arrester, in my opinion, does not enter into consideration at all, as to whether it was an electrical fire or otherwise. I don't think it has any probable bearing on the cause of the fire. It appears in this case that the light wiring inside the mill were encased in steel conduits. I should say that interior metal conduits should be grounded effectually. I can state from my own knowledge that I saw this rule in the book of Underwriters' rules in 1902, and, as far as I know, it has been there ever since. The understood practice, under the general engineers that I have worked for, is to ground metal interior conduits. The purpose is to reduce the fire hazard. It provides a low resistance path for any current that may leap from the wires to the conduit and to the earth, without forming an arc, where it goes to the ground. In other words, it is a safety valve. In the book of 1915, the Underwriters provided for grounding the neutral at the transformer. The history of that rule is about as follows: Somewhere between 1900 and 1910, I think, the National Electric Light Association became interested in the prevention of accidents by grounding the neutral of a transformer. They brought the matter up before the National Board of Fire Underwriters, and tried to get the Board of Underwriters to insert the rule in the book of rules.

(Testimony of B. H. Clingerman.)

The idea in the minds of the heads of the National Electric Light Association was the reduction of the life hazard. They endeavored to get the National Board of Underwriters to put the rule in their books of rules and they objected. The matter dragged for several years, and finally they agreed, and the rule is in there as a rule apparently for the reduction of the fire hazard, but its primary purpose is the reduction of life hazard. There is no controversy among electrical engineers as to whether or not the [118] *the* grounding of the neutral is a good or bad practice. The rule is in the book and we all live up to the rule more or less. All companies have not grounded their transformers. The grounding of the conduits in a lighting system provides a path of low resistance to the ground for the excess current and, therefore, serves the purpose of carrying off any possible excessive current through either failure of the transformer or otherwise. Where the transformer has not failed to perform its function, but there has been some disorder in the lighting circuit itself, the ground on the neutral conduit serves as a means of passing off to the earth any current that might go into the metal conduit by reason of defective insultation, without causing an arc at the point where it leads to the conduit in question.

Q. In other words, where the conduits are not grounded, might a fire occur,—an electric fire occur where the conditions and surroundings of inflammability were favorable, without there being any disturbance or failure of the transformer or excessive cur-

(Testimony of B. H. Clingerman.)

rent being thrown on the lighting wires, through the transformer?

A. The absence of the ground, or course, would mean that the current would tend to go to ground through some other way, and if that happened to be a blowpipe or anything else of that kind, it would go that way. Suppose that this transformer showed absolutely no evidence of failure to perform its function and there is no evidence of excessive current passing from the high side to the low side of the wiring, and nevertheless a fire did *did* occur amidst the conditions of inflammability in that sawmill, the failure to ground the conduits would be a contributing cause, that is, a partial contributing cause. The other might be a break in the wire itself. In other words, there might be an electrical fire without the transformer in any way failing, or without there [119] being any arc at the transformer which would carry the high tension to the low tension wire.

Q. Now, suppose that the evidence showed that this transformer was in no way failing to perform its functions, and bears no evidence that it did fail to perform its functions, then would the fact that the neutral was not grounded have any effect or influence on the question of whether there was an electrical fire or not?

A. That brings up the subject of the grounding of the neutral. It is held by many of us that grounding of the neutral in case a transformer performs its functions as it should, without breaking down,—the grounding of the neutral furnishes one ground and it

(Testimony of B. H. Clingerman.)

requires only one ground to complete the circuit on the other side of the transformer and it therefore increases the fire hazard in that way. Assuming that there is no passage of high voltage to the low voltage wires, the failure to ground the neutral could have no effect—could not cause the fire in that case. Assuming that this neutral was not grounded and the conduits were not grounded, and assuming that the transformer was performing its functions, there could have been an electrical fire to have destroyed the mill—a socket could break down and cause it to heat. That would possibly cause it to set fire to the inflammable material there. Any short circuit would tend to explain the fire. We receive bulletins from fire insurance companies stating the different causes of fire, and in that way the subject comes to my attention in a general way. Accumulation of such waste as is ordinarily accumulated around machinery would constitute a fire hazard.

I have heard the testimony with reference to this transformer and lightning-arrester in this case. I have examined the blue-print (Exhibit 11) to see how this bank of transformers was [120] installed with reference to wiring. I should say that this form of construction is good construction as to in what respect it protects against the jumping of or arcing of the current outside of the transformer. The main essential in construction of this sort is to keep the high voltage wires away from the low voltage wires, which these schemes accomplish. There would be no probable connection, nor would there be no probable jumping of the current or arcing of the current out-

(Testimony of B. H. Clingerman.)
side of the transformer, if the construction was as shown on that blue-print. The essential idea is there could not be and cannot be, and that idea is carried out here. (Witness indicating.) This is a side view of the transformer and pole. On the top arm is located the high voltage wires, and they come down on the back side of this cross-arm through fuse plugs, and then down to the back corner of the transformer. Now, the essential idea in all our construction is to try and keep the high voltage wires from the low voltage wires. These wires are insulated, yet if the wires here run against the wire here, they will jump, so that we try to give them space.

Q. Now, Mr. Grosscup, there has been a suggestion here in the testimony that there may have been an arc inside of the transformer, which permitted the high-tension current to flow into the low side without going through the transformer through some defect in the wiring, instead of the transformer itself, and there has been also a suggestion, or some testimony to show that when this transformer, after the fire was taken to the warehouse, there was an abrasion on the covering of these lead wires inside of the transformer. Would a practical man, having experience with apparatus of that sort, be able to tell whether those abrasions were caused by external force; for instance, [121] a fall or because of an electrical current?

A. He would be able to detect the difference. It would be perfectly manifest. If the windings were burned out, I should say that the transformer would emit a smell which would be unmistakable. That smell would continue for a long time—six months or

(Testimony of B. H. Clingerman.)

more—so that when Mr. Mosby examined this, assuming that he is an experienced and practical man, I should say that he could look at the transformer and smell the transformer and determine whether or not the transformer was burned out, but it is easily conceivable that a puncture might exist from the high to the low, which he could not smell, but could detect by testing it. I heard him testify that he did test it and that is the ordinary and practical way of testing a transformer—the way in common use—and such a test as this would disclose whether or not there was any puncture.

Q. Taking all the testimony together, Mr. Clingerman, as you have heard it upon this trial, and assuming that everyone has told the truth, what would you say was the cause of this fire, if you know? Can you form any conclusion as to the cause of the fire?

A. I rather feel that it is not an electrical fire. I have not heard any evidence tending to show that it was an electrical fire. It might have been that. Assuming that it was an electrical fire, it occurs to me that the transformer is all right. That eliminates one cause of fire. There is no testimony to indicate that the fuses were out of order and it is very probable that the fire was caused by short circuit in the mill. The fuses would blow. While it is possible that the fire might occur by short circuit in the mill due to a defective socket, in my mind it is not probable that the fire was an [122] electrical fire.

Mr. GROSSCUP.—That is all.

(Testimony of B. H. Clingerman.)

Cross-examination.

(By Mr. MacDONALD.)

Q. Assume, Mr. Clingerman, that the lead wire into the case was stripped and then after the fire it was found to be fused by fire and the wires leading into the secondary were without insulation between them and the porcelain top which formed the insulation between them and the case had been broken by some means or other, isn't it possible that a current might have passed through that case from this insulation which was afterwards fused—fused through the case and out of that secondary? And wouldn't that let the load from the primary in onto the secondary?

A. Yes, assuming that the brass cylinders in the electric arrester were fused and the air gaps in the lightning-arrester were closer together than their normal condition, it would induce the resistance of the passage of the current to earth. If on that primary which is carrying 2200 volts and sometimes more, there were connected a lightning-arrester, which would leak with that pressure upon it, it might form a permanent and constant ground when the primary system was carrying a load of at least 2200 volts. If a test would show that it would leak under a pressure of 2200 volts then it would not necessarily form a permanent accidental ground. A lightning-arrester would break down on this rated voltage would probably burn until it burned itself clear—that is why we don't know about lightning-arresters burning. In my public utility experience, we always

(Testimony of B. H. Clingerman.)

assumed that there is another ground, and if it didn't happen to have another ground, that potential in there would be merely a potential. I stated that the conduit in the secondary should properly have been [123] grounded. That would be true with equal force if the neutral wire were not grounded. The idea of the ground is to conduct the stray current resulting from defective insulation, directly to the ground without an arc, and it serves that purpose whether or not the neutral from the transformer is grounded. I cannot say that it would constitute an additional fire risk. I heard Mr. Kimmel testify in reference to the passage of this current from the secondary in the conduit to the conduit and down through the ground and back to the accidental ground. Perhaps an arc would be formed between the wire and the conduit, but the grounding of the conduit eliminates the arcing between the conduit and the pipe that conduits it to the ground, but does not eliminate the arcing between the wires and the conduit. That cause might exist notwithstanding the fact that the conduit was grounded. The grounding of the conduit provides an additional ground between the conduit and whatever happened to be in connection with the conduit itself. The grounding of the conduit reduces the fire hazard, because it furnishes a permanent path for the current to go to ground. Assuming the diagram you have in hand is the conduit and with two wires inside. Now, if that conduit is grounded there would be no arc formed between the conduit and the ground. That

(Testimony of B. H. Clingerman.)

wouldn't eliminate the arcing between these wires and the conduit, but the fire hazard would not still exist, as Mr. Kimmel states. If your ground exists on this side—this accidental ground—and you have a good working ground here, why your circuit will be completed between these two grounds, rather than running through the mill and arcing. If your neutral were grounded, both the arc outside and inside of the conduit would have been eliminated, if the primary and secondary wires were in contact. Assuming that the primary and the secondary wires are not in contact, the value [124] of the grounding of the conduit to prevent fire between the secondary wires is because it furnishes a low resistance path to earth in case the insulation is defective. The idea is that there may be two defects in the insulation one place to another. There has to be two grounds to produce a circuit. If one is a dead ground there would be no arc. If the conduit was grounded for that purpose there would be no arc there.

Mr. MacDONALD.—Q. Mr. Clingerman, using this diagram—a ground from the conduit to another ground from the secondary and assuming a leak between one of the secondary wires to the conduit, and this ground, would this ground convey away that potential?

A. Well, assuming the case of the grounded neutral or some other ground to produce the arc, and assuming that a defective socket caused the fire, it should blow the fuse.

(Testimony of B. H. Clingerman.)

Redirect Examination.

(By Mr. GROSSCUP.)

If there was an overload on the secondary circuit, or the lightning circuit, by reason of the failure of the transformer to perform its function, that ought to blow the fuse. In other words, the whole question is predicated on the failure to blow the fuse. If the fuse would perform its business there would not be a fire. The fuse is there for the purpose of protecting property. A direct ground or low resistance ground would prevent what Mr. Kimmel has attributed here to an arc attributable to a high resistance. In other words, if Mr. Kimmel's idea was that this current poured in on the light wire, it would find its way to the ground and then back somewhere around into the system, running a current through the ground by means of a contact between, perhaps, the conduit and the blowpipe. That arc would be eliminated by the permanent and effectual grounding of the pipes. If, as Mr. [125] Kimmel testified that through the failure of the transformer of arcing around the transformer, a heavier current on the lightning side would find its way through the conduits or wiring and through at a point which he described as low resistance—possibly the blowpipe, and it would form a spark in jumping across from the tubes to the blowpipe for instance, and under inflammable conditions might cause fire. A direct or low resistance ground would eliminate that danger. That is one of the purposes of the low resistance ground. In order to form a circuit there cannot be a passage of elec-

(Testimony of B. H. Clingerman.)

tricity without the opportunity for a circuit. That circuit may pass through the ground, the earth or through a metallic substance or anything else of that kind, so that any condition that might perform that circuit would have the tendency to eliminate the spark. As far as returning the current back into the apparatus where the circuit would go to where it once reached the ground and then got back again, no electrician could tell how it happened in the case of 2200 volts. In the case of 110 volts that is predicated on defective insulation somewhere and does not always find its way back in a case of low voltage. It is possible that if there was a defect at the point of entrance and another where the secondary wire entered the transformer, that it might ground through the case between those two points, although those bushings are designed for that purpose. A practical man accustomed to machinery of this sort would be able to say whether an arc of that kind had occurred in there. He would notice it on the lead itself. I heard Mr. Mosby testify here, and he said from an examination of these wires there was no evidence of an electrical effect. If there had been such an entrance, we would all expect to see evidence of such an electrical breakdown. The light wiring universally put in is of sufficient leaway or of sufficient factor of safety to carry a somewhat [126] higher voltage than the normal rate. It will carry a nominal voltage of 250 volts, but I have tested the wire and put 1500 volts on it but it did not break

(Testimony of B. H. Clingerman.)

down, so there would be no particular danger from 110 to 120 volts. [127]

### Testimony of J. C. Dow, for Defendant.

J. C. DOW, a witness called on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Grosscup, and testified as follows:

Mr. SMITH.—We will admit Mr. Dow's qualifications.

Mr. DOW.—I am operating engineer for the Great Falls Power Company. I have occupied that position since last May. I have had practical experience with electrical apparatus for eighteen years.

Q. Mr. Dow, it is admitted in this case that this sawmill building belonging to the Jordan Lumber Company burned down on Christmas morning, 1917. The sawmill had been in operation practically for five years or more. The sawmill employed a number of motors inside for driving machinery. Those motors were supplied with electrical current from the plant of defendant—the Northern Idaho and Montana Power Company—by means of a high-voltage line from the power plant to Columbia Falls, where it was transformed into approximately 2300 volts, and a line built from the station to mill, a distance of about one and a quarter mile. At the mill at the termination of the 2300 volt line, there was placed a bank of 30–K. W. transformers. It was a three-phase system. From one of these transformers there was a line intended to supply the mill and an adjacent cottage—perhaps two cottages—with elec-

(Testimony of J. C. Dow.)

tric light. The lights and lighting wires inside the mill were enclosed in metallic or steel conduits with the ordinary form of connection for droplights. Now, that in a general way, was the situation. There has been some testimony introduced in this case showing, or tending to show, that when the machinery in the mill—I mean the motor machinery in the mill and the attached mechanical appliances—were in operation, that these lights [128] became somewhat dim and that a flat-iron in a cottage did not heat up in the normal way. That when the motors of the mill were shut off and were not operating any machinery that the lights brightened up in a short time. From that circumstance would you attribute any defect either in the installation or maintenance of or operation of the electrical machinery and appliances, up to and including the transformer?

A. No. That is a common occurrence in appliances of that character for lights to operate or act in that way. It is universal with an installation of that kind.

Q. There is some testimony tending to show, or possibly tending to show that a distance of something more than 100 feet—I think about 200 feet—or about 125 feet—from the transformer on a point carrying three wires, there was placed three lightning-arresters and that after the fire it was seen that one of these lightning-arresters had a very close contact or approaching a contact between two or more of the cylinders at the entrance end. Two or more of

(Testimony of J. C. Dow.)

these cylinders were so close together that a sheet of paper would not slide between them. Would you attribute to that condition of the lightning-arrester, any disturbance or disorder likely to cause a fire?

A. I would say that that condition indicated that the lightning-arrester had been performing its function, and that the condition would not be a probable cause of fire.

Q. At the time of the fire—or during the progress of the fire—I wish to add this additional information concerning the transformers: They were installed in February, 1914, and had been in use thereafter a little less than two years. They were mounted on cross-arms and attached to two poles about 18 feet above the surface of the ground. I mean by ground the earth. [129] The poles were considerably higher than that. During the progress of the fire, the poles—one of them—burned down and the cross-arm became partially burned. At any rate the transformer fell to the ground—one of the transformers turned over in the process of falling, or at least it was found turned upside down. The covering plate was broken, but broken so that it showed that it was a recent break, and was bright with no electrical action indicated. Neither—none of the wiring either inside of the transformer leading to the coils, or from the coils showed any indication of electrical action, or the influence of electrical action or current. The transformer was tested out, the coils not being rewound as it had a temperature of 2,000

(Testimony of J. C. Dow.)

volts, and then subsequently had a pressure of 4,000 volts, and no puncture was found in the transformer nor any other disorder. The wiring going in from the high side was put in in such a way so that the wires could not come in contact with each other or in contact with the secondary wire.

Under these conditions, would you say that the existence or nonexistence of a ground wire from the neutral on the secondary side to the ground, would have had any influence whatever to prevent a fire in the sawmill in question?

A. There are so many other conditions that would have to be involved that it is impossible to answer the question satisfactorily. To prevent loss of life and fire hazard in case an accidental condition arises in the transformer, which would cause a contact between the primary and the secondary circuits. If there is no evidence that there has been a contact between the primary and the secondary circuits, or any evidence of a disturbance of the functional operation of the transformer, then in that case the ground of the neutral or secondary would not serve any particular [**130**] purpose, and assuming that the transformer was performing its functions, the failure to have that ground wire would not be any cause to which you could attribute the existence of a fire.

The purpose of grounding the conduits is to prevent an arc taking place between the conduit and water-pipes and other pipes around, and if it is shown that these conduits were in close proximity to the metal blowpipes, the grounding of these sockets

(Testimony of J. C. Dow.)

would have influence on the sustaining of the spark between the blowpipes and the conduits. If those conduits happened to be covered with such inflammable substances as wood dust and there was a defect in the wiring system which caused the leakage of current into the conduits, then and without such a ground, it would be quite possible for a spark to ignite that inflammable material. This would be prevented by means of grounding the conduits.

If this fire was caused by electricity at all, and if this transformer was working perfectly and you had no evidence of any additional defects at the time, and the conduits were not grounded, you could attribute the cause of the fire—such an electrical fire—if there was one, to various possibilities, all of them more or less remote. There are many possibilities. I don't know that it would be possible to give preference to any one. To state some of them—the conduits not being grounded, if one of the wires within the conduit should come in contact with the conduit, one of the other wires coming in contact with the ground or with the outside of this conduit might cause an arc to be formed on the outside of the conduit, which would set fire to the inflammable material. I said one of the other wires, as I would very much suppose that the conduit itself was near enough to the ground so that an arc might become established. There [131] are many conditions that are necessary to suppose before such a fire could be established in such a way. A defective socket might short circuit at any time, whether it was in use or not, and

(Testimony of J. C. Dow.)

whether it had a lamp in it or not, and if the fuse were of too large capacity the arc might be maintained on the cord to burn the cord off and cause the socket to drop and set fire to the inflammable material. We can presuppose many other conditions that might cause an electrical fire, and all wholly independent of the failure of the transformer to perform its functions. We frequently have electrical fires in which we cannot find the cause because the evidence is nearly always destroyed. There are many fires supposed to be electrical fires simply because there are electric wires in the building.

Cross-examination.

(By Mr. SMITH.)

In my business you can never tell what contingency might arise or what accident might occur in order to make a short circuit, or produce a fire or some accident of that kind. We try our best to guard against just such contingencies.

Q. And the grounding of a neutral wire on a transformer is one of the precautions you take, isn't it?

A. It has been operated by the underwriters in the past, but I have followed the practice many years and still follow it in connection with the Great Falls Power Company. It alters the hazards but in the long run it reduces the hazard—it reduces the total hazards but it alters them.

Q. This condition that you have said might be apprehended [132] or feared at any time if a plant of this kind, in relation to this conduit system could all be eliminated from consideration here could

(Testimony of J. C. Dow.)

it not and discarded, if there had been a grounding of the neutral wire on the transformer that brought the current into the building?

A. Not all. That would increase the fire hazard and reduce the life hazard.

The hazard due to the failure of the transformer would be reduced by the grounding of the secondary coming together in the transformer, but that is something we try to avoid. As to whether grounding the neutral will take care of the hazard entirely depends on the efficiency of the ground and various other conditions. It reduces it.

Q. Now, I will get you back to the other proposition: If this fire were caused by a contact between the primary and the secondary in the transformer, or some defect in the transformer, and there had been a neutral grounding on the transformer which had taken care of the condition that was brought about by the defective wiring there getting together, then it wouldn't make any difference what the condition of the conduit system in the mill was, would it?

A. I cannot say that it would.

Q. And it wouldn't make any difference whether it would be grounded or not? A. No.

Mr. SMITH.—That is all. [133]

Redirect Examination.

(By Mr. GROSSCUP.)

I have said that on the whole I think the fire hazard is increased by grounding the neutral. A fire can very easily be influenced by a short circuit of 110 volts lighting circuit, and that short-circuit ground

(Testimony of J. C. Dow.)

can come about by direct contact between the two wires or by each wire being grounded and an arc being formed at either place of grounding. If one wire is permanently grounded such as the grounding of a neutral, one other ground is sufficient to cause a short circuit which might easily form a fire, and if neither wire is grounded it necessitates two accidental ground conditions to produce a short circuit and to make a fire. In other words with the neutral not grounded, the chances are less then that the short circuit will occur to produce a fire. It takes two groundings to produce a condition that is most likely to cause a fire. This is a condition to be guarded against, that is, the condition which arises from grounding, and if in this case, the transformer did perform its functions then the fire hazard would have been increased by grounding the neutral.

Mr. GROSSCUP.—That is all.

Recross-examination.

(By Mr. SMITH.)

I am familiar in a general way with the Manuel of the National Board of Underwriters.

Q. I call your attention to paragraph 14, line 29, and to paragraph 15, line 31, and I will read to you shortly (reading): "Where transformers are to be connected to high-voltage [134] circuits, it is necessary in many cases for best protection of life and property, that the secondary system be permanently grounded and provision should be made for it when the transformers are built." Do you agree with that? A. I do.

(Testimony of J. C. Dow.)

Q. Here is another one (reading):

"B—Transformers secondaries of distributing systems (except where supplied from private industrial power or lighting plants where the primary voltage does not exceed 550 volts) must be grounded, provided the maximum difference of potential between the grounded point and any other point in the circuit does not exceed 150 volts, and may be grounded when the maximum difference of potential between the maximum difference potential between the grounded point and any other point in the circuit exceeds 150 volts. In either case the following rules must be complied with:

1—The grounding must be made at the neutral point or wire, whenever a neutral point or wire is accessible.

2—When no neutral point or wire is accessible, one side of the secondary circuit must be grounded.

3—The ground connection must be at the transformers or on the individual service, as provided in Section c to g, inclusive, and when transformers feed systems with a neutral wire, the neutral wire must also be grounded at least every 500 feet."

Do you agree with that, that it is a reasonable rule and founded on experience?

A. As a precaution to life. I do not consider it a precaution to fire at all. For many years the National Board of Fire Underwriters refused to permit such a grounding presumably because it increased the fire hazard.

(Testimony of J. C. Dow.)

Q. It is a regulation of the Board of Fire Underwriters, isn't it?

A. I know but they also consider the life hazard.

Mr. SMITH.—That is all. [135]

IN REBUTTAL EVIDENCE.

**Testimony of William L. Kimmel, for Plaintiff (In Rebuttal).**

KIMMEL, having been previously sworn was recalled in rebuttal, and testified as follows:

I recall when the witness Miller was on the stand that his attention was called to a certain conversation had in Judge Erickson's office. Mr. Utter and Mr. McDonald and Mr. Erickson, the attorney here, and I think Mr. Stiles also were present. He said in that conversation that the transformer at the time he saw it, was on fire.

Q. And is that the thing you told the Court you had in mind when you went outside of the hypothetical question this morning.

A. That was the exact thing.

**Testimony of Fred Utter, for Plaintiff (In Rebuttal).**

UTTER, having been previously sworn, was recalled in rebuttal and testified as follows:

I was present at a conversation in Mr. Erickson's office, that has just been referred to, at which Carl Miller was present. His attention was called to it this morning. Miller said in substance that the transformer was on fire or was burning.

(Testimony of Fred Utter.)

Cross-examination.

(By Mr. LOGAN.)

Q. Did he say transformer or the transformer pole?

A. He said transformer. I asked him if he was sure the transformer was burning and he said it was, and I asked if the lead was on and he said it was, and I said where was the fire coming from, and he said from inside of the transformer. [136]

**Testimony of Charles H. Stiles, for Plaintiff (In Rebuttal).**

STILES, having been previously sworn, was recalled for examination in rebuttal and testified as follows:

I was present at that conversation. Carl Miller said in substance that the transformer was on fire. He said it was burning on the inside.

That is all.

Plaintiff rests. [137]

That the decision and opinion of said Court and said cause was in writing, and omitting title of Court and Cause is as follows:

**Opinion and Decision.**

"The complaint alleges plaintiff's planing-mill was destroyed by fire caused by electric current escaping by reason of defendant's negligent construction and maintenance of its instrumentalities devoted to supplying such current for power and light to said mill.

The answer denies the cause of the fire and any defendant's negligence.

Trial to the Court the Court finds for plaintiff and against defendant, and for damages in the amount of Thirty-four Thousand Five Hundred Dollars.

That the fire was caused by the electric current is demonstrated to a reasonable probability by a preponderance of the evidence. In any case of a burned building wherein is electric current, there is possibility the current caused the fire; and if all other causes are fairly eliminated by the evidence the possibility becomes a reasonable probability. Because from the nature of the thing comparatively often electric current negligently or accidentally can and does escape and set fire. In this case the day and hour of the fire, the weather, the location of the mill, its idle state, war times, fairly exclude likelihood that the fire was caused by mill employees, lightning, hoboes or passing trains, etc. Furthermore, the electric instrumentalities both within and without the mill are proven to have been so defective that because thereof the current would likely escape and set fire. When evidence discloses a sufficient and probable cause of an effect,—more probable than any other cause it is a reasonable inference that the more probable cause produced [138] the effect; and that inference must be drawn.

But was the escape of the current accidental or negligent and if the latter, whose was the negligence?

At the time of the fire, the power switch was open; the light switch was closed. Within the mill the instrumentalities were plaintiff's, a year before the fire they had been condemned by the insurance underwriters, and they were still in process of uncompleted

change at odd times by plaintiff's planerman and men supervised by him. It's a resistless inference the system within the mill was a fire hazard, because of which plaintiff was without insurance at the time of the fire.

Without the mill the instrumentalities were defendant's Forty-eight feet from the mill were the transformers and 125 feet beyond them and upon the primary wires were the lightning-arresters. From inspection and testing after the fire, it appears and without real conflict that one of these arresters was in an obviously defective condition and which caused it to operate as a continuous ground of the primary wires. It likewise appears that this grounding of the primary wires would tend to induce grounding elsewhere, creating a condition favorable to fire—probably a sustained arc likely to fire any inflammable material adjacent. The conditions in the mill, the nature of the wiring therein, and the fire, all render it probable that the continuous ground at the arrester did finally induce grounding in the mill under circumstances that set the fire,—that in view of all the circumstances the fire was caused by the electric current and by the arrester defective and active as aforesaid.

It is true plaintiff's defective instrumentalities might cause fire, but it is more probable that the arrester [139] caused it. To create a condition favorable to set fire there must be two groundings of the wiring. The arrester a continuous ground, would probably set fire whenever another ground was by it induced or which happened in the mill. The plain-

tiff's defective instrumentalities would not set fire until two grounds occurred in the mill. The probabilities are two to one in favor of the theory that the arrester operating with one ground in the mill, as it would, is the cause of the fire.

That the mill's defective instrumentalities might have been an agency of the fire is not suggested by defendant, save that plaintiff's failure to ground its conduits is claimed to be contributory negligence.

Contributory negligence is not pleaded, and does not appear. Plaintiff was not bound to anticipate defendant's negligence. Plaintiff might be willing to hazard all accidental damage which it might avoid by grounding its conduits, but thereby would not assent to or assume the risk of damage from defendant's negligence. So too, of plaintiff's defective instrumentalities in general.

See 232 U. S. 349–353.

See cases cited 29 Cyc. 517.

The arrester defective and causing the fire, the burden is upon defendant to rebut the inference of negligence therefrom arising. Whether the arrester was sound when placed in position, whether due inspection was made, does not appear. See 224 U. S. 95. Herein, is proven the negligence charged by plaintiff against defendant. So far as plaintiff counts upon a defective transformer it has failed. The evidence does not persuade that the transformer was in anywise defective. The complaint filed two months after the fire, contained only a "catch-all" charge of defective instrumentalities. Immediately after the fire [140] plaintiff instituted investigation to fix liabil-

ity upon defendant. Its manager testified he saw the transformer on fire indicating fire within it. But though these transformers fell to the ground by reason of their wires and poles burned by the mill fire, neither he nor any his searchers for evidence even thought to examine them as they lay upon the ground, much less to test them, but passed them by, so they say, to examine and test the arresters. There and elsewhere they saw these transformers repeatedly, and yet they at no time did more than "casually" look at them. No other witness of several at the fire saw the transformer on fire. Plaintiff's principal expert on the scene early to sell motors, etc., to plaintiff, discussed the fire with the manager, but did not conclude that the fire was due to the current until over a year later when he heard an employee of defendant's say the transformer was on fire and another employee say one coil had been rewound. It is inconceivable had the manager seen the transformer on fire within, that he would not have told his searchers and expert, and first proceeded to thorough examination and test of the transformer. It is apparent the said expert had no inkling of it until he heard the said employees as aforesaid. From all they knew and saw, plaintiff's witnesses doubtless concluded the mill fire alone had effected the transformer, until after the employees' statements aforesaid. The charred appearance of the transformer, dragged from one of plaintiff's witnesses at the very end by gross leading, is more likely due to the mill fire.

It was ample thereto, and Utter for plaintiff testifies it appeared as though due to a fire *around* the

transformer. It is true defendant might have submitted more evidence in [141] relation to this transformer, but on the whole the best that can be said of plaintiff's evidence is that it indicates the transformer was affected by fire but no more likely from fire within due to defects than from the mill fire without. So far as appears plaintiff had ample opportunity to know all necessary in respect to the transformers. The manager at the fire was not likely giving serious attention to the transformer. He could now easily confuse a pole afire or even oil boiling out and burning from the mill fire, with fire within the transformer. As for the employees' statements, it need not be pointed out they are not evidence of the facts,—of fire within the transformer due to defects. They serve for impeachment only.

Defendant's failure to ground the secondary wires or neutral was not negligence. To so ground decreases some hazards but increases others. It was and is in doubt which is the better practice so far as fire is concerned. At argument, it was admitted the value of the property destroyed was $30,500.00. Plaintiff's established business of profit was diligently restored five months after the fire. Four thousand dollars for lost profits are sustained by the proof, found and allowed. Some profit seems included in the value of property destroyed. Judgment accordingly.

Decision is late, because until recently the Court understood the case was settled.

Feb. 3, 1919.

BOURQUIN, J. [142]

That thereafter pursuant to stipulations of the parties, the Judge of said Court made an order granting the defendant thirty days' additional time within which to prepare and serve its Bill of Exceptions.

And thereafter and pursuant to stipulation of the parties, the Judge of said Court made an order granting the defendant sixty days in addition to the time allowed by law and the previous order of the Court, in which to prepare and serve its Bill of Exceptions.

Now comes the defendant, Northern Idaho & Montana Power Company, and submits herewith this, its proposed Bill of Exceptions.

Dated this 6th day of May, 1919.

B. S. GROSSCUP,
SIDNEY M. LOGAN,
Attorneys for Defendant.

Service of the foregoing Bill of Exceptions accepted this 6th day of May, 1919.

HENRY C. SMITH,
FOOT & MacDONALD,
J. E. ERICKSON,
Attorneys for Plaintiff. [143]

**Order Settling Amended Bill of Exceptions.**

United States of America,
District of Montana,—ss.

I, George M. Bourquin, Judge of the District Court for the District of Montana, do hereby certify that the foregoing is a full, true and correct bill of exceptions in said action, and that the recitals therein regarding the testimony introduced are true and correct and the same is now by me hereby settled, allowed

and approved as a true and correct bill of exceptions in said action.

Dated in open court this 13th day of June, 1919.

BOURQUIN,

Judge.

Filed June 13th, 1919. C. R. Garlow, Clerk. [144]

---

Thereafter, on July 23, 1919, assignment of errors was duly filed herein, as follows, to wit:

(Title of Court and Cause.)

**Assignment of Errors.**

Now comes the plaintiff in error, by its attorneys Benjamin S. Grosscup and Sidney M. Logan, and makes and files its assignment of errors as follows:

I.

The trial Court erred in finding and holding that the fire which destroyed plaintiff's mill was of electrical origin or attributable to electrical causes.

II.

The trial Court erred in finding and holding that the fire which destroyed plaintiff's mill was attributable to any cause or instrumentality over which the defendant had control, and particularly erred in drawing the inference and in finding that the fire was of electrical origin from the following facts found by the Court:

> "That the fire was caused by the electric current is demonstrated to a reasonable probability by a preponderance of the evidence. In any case of a burned building wherein is electric cur-

rent, there is possibility the current caused the fire; and if all other causes are fairly eliminated by the evidence the possibility becomes a reasonable probability. Because from the nature of the thing comparatively often electric current negligently or accidentally can and does escape and set fire. In this case the day and hour of the fire, the weather, the location of the mill, its idle [145] state, war times, fairly exclude likelihood that the fire was caused by mill employees, lightning, hoboes or passing trains, etc."

III.

The trial Court having found:

"The electric instrumentalities both within and without the mill are proven to have been so defective that because thereof the current would likely escape and set fire * * * Within the mill the instrumentalities were plaintiff's; a year before the fire they had been condemned by the insurance underwriters and were still in process of uncompleted change at odd times by plaintiff's planerman and men supervised by him. It is a resistless inference the system within the mill was a fire hazard, because of which plaintiff was without insurance at the time of the fire."

and said finding of the Court being fully sustained by the evidence, the Court erred in attributing the cause of the fire to instrumentalities without the mill over which the defendant had control.

IV.

The Court erred in finding and holding that not-

withstanding plaintiff's negligence in maintaining its electrical appliances within the mill in such manner as to constitute a probable cause of the fire, the plaintiff can recover.

V.

The Court erred in finding as a matter of law that the negligence of the plaintiff in failing to maintain the electrical appliances under its charge within the mill in a safe condition did not constitute a bar to plaintiff's recovery because the defendant did not plead contributory negligence.

VI.

The Court erred in finding that the lightning-arrester outside the building, if detective, was the cause of the fire.

VII.

The Court erred in finding that if said lightning-arrester was found to be defective after the fire, defendant is responsible [146] for such defect, it appearing in the undisputed evidence that whatever defect existed in the lightning-arrester was caused by lightning and the frequent electrical storms that occurred after the ordinary season of inspection in the spring of the year.

VIII.

The Court erred in his conclusions arrived at from his findings of fact.

IX.

From the findings of fact, judgment should have been entered for the defendant.

WHEREFORE plaintiff in error prays that the judgment of the United States District Court for the

District of Montana may be reversed and the cause remanded to the District Court with orders to dismiss.

BENJAMIN S. GROSSCUP,
SIDNEY M. LOGAN,
Attorneys for Plaintiff in Error.

Assignment of errors called to the attention of and noted this —— day of July, 1919.

_____

Judge.

Filed July 23, 1919. C. R. Garlow, Clerk. [147]

---

Thereafter, on July 23, 1919, petition for writ of error was filed herein, as follows, to wit:

(Title of Court and Cause.)

**Petition for Writ of Error.**

To the Honorable GEO. M. BOURQUIN, Judge of said Court:

Now comes the plaintiff in error in the above-entitled cause and represents to your Honorable Court:

I.

That heretofore in that certain cause wherein A. L. Jordan Lumber Company was plaintiff and Northern Idaho and Montana Power Company defendant in the District Court of the United States for the District of Montana, parties having waived a jury, the Court heard the evidence and argument of counsel and thereafter on the 3d day of February, 1919, the District Judge before whom said cause was tried filed a written opinion embracing his finding in fact.

Thereafter on the 5th day of February, 1919, judgment was entered in favor of the plaintiff in the court below, for the sum of $34,500.00 damages and $577.40 costs. That thereafter and heretofore the plaintiff in error herein, the defendant in the court below, duly filed its bill of exceptions, which bill of exceptions was settled and made a part of the record in said cause in the District [148] Court and thereafter and heretofore the plaintiff in error has filed its assignment of errors and caused the same to be made a part of the record in the District Court.

The Northern Idaho and Montana Power Company, the defendant in the court below, plaintiff in error herein, charges and alleges that the judgment of the District Court for the District of Montana was erroneously entered in favor of the defendant in error and that such judgment should have been made and entered in favor of the plaintiff in error.

WHEREFORE the plaintiff prays that a writ of error issue in its behalf out of the United States District Court for the District of Montana for the correction of the errors so complained of and that a transcript of the record of the proceedings and all things necessary be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

B. S. GROSSCUP,
SIDNEY M. LOGAN,
Attorneys for Plaintiff in Error.

Filed July 23, 1919. C. R. Garlow, Clerk. [149]

Thereafter, on July 23, 1919, order allowing writ of error was duly made and entered herein, as follows:

(Title of Court and Cause.)

**Order Allowing Writ of Error.**

Now, on this 23d day of July, A. D. 1919, comes the plaintiff in error, Northern Idaho and Montana Power Company, by its attorneys, and presents to the Court its petition praying for the allowance of a writ of error together with an assignment of errors intended to be urged by it in the Circuit Court of Appeals, praying also that the transcript of record and proceedings in this cause, with all things concerning the same, be sent to the Circuit Court of Appeals for the Ninth Circuit, on consideration whereof the Court does hereby allow the writ of error prayed for, upon the giving of a bond in the penal sum of $500.00, in the form and with sureties approved by the Court for the payment of all costs which may hereafter be assessed against the plaintiff in error in the United States Circuit Court of Appeals for the Ninth Circuit.

BOURQUIN,
Judge.

Filed July 23, 1919. C. R. Garlow, Clerk. [150]

Thereafter, on July 23, 1919, bond on appeal was duly filed herein, as follows, to wit:

(Title of Court and Cause.)

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS: That Northern Idaho and Montana Power Company, as principal, and National Surety Company, as surety, are well and truly bound unto A. L. Jordan Lumber Company, the defendant in error in the penal sum of Five Hundred Dollars ($500.00), for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns.

Dated at Tacoma, Washington, this 11th day of July, 1919.

The condition of the above obligation is such that whereas Northern Idaho and Montana Power Company has filed in the Circuit Court of Appeals of the United States a petition in error seeking a reversal of a certain judgment entered against it and in favor of the defendant in error in the United States District Court for the District of Montana in that certain cause wherein A. L. Jordan Lumber Company was plaintiff and Northern Idaho and Montana Power Company was defendant,—

Now, therefore, if Northern Idaho and Montana Power Company, plaintiff in error, shall well and truly pay all costs assessed against it in the United States Circuit Court of Appeals by reason of said proceedings in error, the foregoing [151] obliga-

tion shall be void; otherwise in full force and effect.

NORTHERN IDAHO AND MONTANA POWER COMPANY,
By BENJAMIN S. GROSSCUP,
Its Attorney,
Principal.

NATIONAL SURETY COMPANY,
By FREDERICK D. METZGER,
Resident Vice-President.
[Seal] F. W. SWEETLAND,
Resident Assistant Secretary,
Sureties.

The foregoing bond is approved this 23d day of July, 1919.

BOURQUIN,
Judge.

Filed July 23, 1919. C. R. Garlow, Clerk. [152]

---

Thereafter, on July 23, 1919, a citation was duly issued herein, which original citation is hereto annexed and is in the words and figures following, to wit: [153]

*In the United States Circuit Court of Appeals for the Ninth Circuit.*

NORTHERN IDAHO AND MONTANA POWER COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. L. JORDAN LUMBER COMPANY, a Corporation,
Defendant in Error.

**Citation on Writ of Error.**

To A. L. Jordan Lumber Company and Its Attorneys, GREETING:

You are cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the United States District Court for the District of Montana, wherein Northern Idaho and Montana Power Company is plaintiff in error and A. L. Jordan Lumber Company is defendant in error, to show cause, if any there be; why the judgment rendered against the plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the party in this behalf.

Dated this 23 day of July, 1919.

GEO. M. BOURQUIN,
Judge.

Copy of within citation received this 26th day of July, 1919.

J. E. ERICKSON,
T. H. McDONALD,
HENRY C. SMITH,
Attorneys for Defendant in Error. [154]

[Endorsed]: No. 583. In the United States District Court, District of Montana. A. L. Jordan Lumber Company, a Corporation, Plaintiff, vs. Northern Idaho and Montana Power Company, a

Corporation, Defendant. Citation on Writ of Error. Filed July 28, 1919, C. R. Garlow, Clerk. [155]

---

Thereafter, on July 23d, 1919, writ of error was duly issued herein, which original writ is hereto annexed and is in the words and figures following, to wit: [156]

*In the United States Circuit Court of Appeals for the Ninth Circuit.*

NORTHERN IDAHO AND MONTANA POWER COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. L. JORDAN LUMBER COMPANY, a Corporation,

Defendant in Error.

**Writ of Error.**

The President of the United States of America, to the Honorable Judge of the District Court of the United States for the District of Montana:

Because of the records and proceedings, as also in the rendition of judgment, which is in the said District Court before you, in that certain action wherein A. L. Jordan Lumber Company was plaintiff and Northern Idaho and Montana Power Company, defendant, manifest error has happened to the great damage of the defendant in the said District Court, as by the record in said court appears, we being willing that error, if any has been done, should be

duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command that you send under seal the record and proceedings, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same at the city of San Francisco, in the State of California, where said Court is sitting, within thirty (30) days from date hereof, in the said Circuit Court of Appeals then and there held, that the record and proceedings aforesaid **[157]** be inspected in order that the said Circuit Court of Appeals may cause to be further done what of right and according to the laws of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States of America, this 23d day of July, 1919.

[Seal] C. R. GARLOW,

Clerk U. S. District Court, District of Montana.

Allowed this —— day of July, 1919, after the plaintiff in error had filed with the clerk of this court its assignment of errors and its petition for writ of error, together with a bond for payment of costs in the said proceeding in error.

_____,

Judge of the United States District Court for the District of Montana. **[158]**

**Answer of Court to Writ of Error.**

The answer of the Honorable, the United States District Judge for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is

made, with all things touching the same, I certify under the seal of the said District Court to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal] C. R. GARLOW,
Clerk. **[159]**

[Endorsed]: No. 583. In the United States District Court, District of Montana. A. L. Jordan Lumber Company, a Corporation, Plaintiff, vs. Northern Idaho and Montana Power Company, a Corporation, Defendant. Writ of Error. Filed July 28, 1919. C. R. Garlow, Clerk.

Service of the within and foregoing writ of error by the receipt of a true copy thereof, together with true copies of the exhibits recited therein as being attached thereto, hereby is admited in behalf of all parties entitled to such service by law or by rules of court, this 26th day of July, 1919.

J. E. ERICKSON,
T. H. McDONALD,
HENRY C. SMITH,
Plffs. Attys. **[160]**

Thereafter, on July 28th, 1919, praecipe for transcript was filed herein, as follows, to wit:

(Title of Court and Cause.)

**Praecipe for Transcript of Record.**

To the Clerk of the United States District Court for the District of Montana:

Please prepare record for the purposes of a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit and include the following:

1. Complaint.
2. Answer.
3. Opinion of the Court ordering judgment.
4. Judgment.
5. Bill of exceptions.
6. Assignment of errors.
7. Order settling bill of exceptions.
8. Petition for writ of error.
9. Writ of error.
10. Citation.
11. Order allowing writ of error.

All captions, verifications, file-marks and endorsements may be omitted.

BENJAMIN S. GROSSCUP,
SIDNEY M. LOGAN,
Attorneys for Plaintiff in Error.

Provisions of the Act approved February 13th, 1911, are hereby waived and you are requested to forward typewritten transcript to the United States

Circuit Court of Appeals for printing under Rule 105 of this court.

BENJAMIN S. GROSSCUP,
Attorney for Plaintiff in Error.

Filed July 28th, 1919. C. R. Garlow, Clerk. **[161]**

---

**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 161 pages, numbered consecutively from 1 to 161, inclusive, is a full, true and correct transcript of the record and all proceedings had in said cause required to be incorporated in the record on appeal therein by the praecipe of the plaintiff in error, and of the whole thereof, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citation and Writ of Error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Seventy-five and 25/100 Dollars, ($75.25), and have been paid by plaintiff in error.

In Witness Whereof I have hereunto set my hand

and affixed the seal of said court, at Helena, Montana, this 22d day of August, A. D. 1919.

[Seal] C. R. GARLOW,
Clerk. **[162]**

---

[Endorsed]: No. 3382. United States Circuit Court of Appeals for the Ninth Circuit. Northern Idaho and Montana Power Company, a Corporation, Plaintiff in Error, vs. A. L. Jordan Lumber Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed August 25, 1919.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

---

*United States Circuit Court of Appeals for the Ninth Circuit.*

No. ——.

NORTHERN IDAHO & MONTANA POWER COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. L. JORDAN LUMBER COMPANY, a Corporation,
Defendant in Error.

**Order Extending Time for Filing Transcript on Appeal.**

For good cause appearing to the Court, it is hereby ordered that the time for filing the record on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled action, be and is extended for a period of ten days.

Dated August 19, 1919.

BOURQUIN,
Judge.

[Endorsed]: No. 3382. United States Circuit Court of Appeals, Ninth Circuit. Northern Idaho & Montana Power Co., Plaintiff in Error, vs. A. L. Jordan Lumber Co., Defendant in Error. Order Extending Time for Filing Transcript on Appeal. Filed Aug. 22, 1919. F. D. Monckton, Clerk. Refiled Aug. 25, 1919. F. D. Monckton, Clerk.

---

*In the United States Circuit Court of Appeals for the Ninth Circuit.*

NORTHERN IDAHO AND MONTANA POWER COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. L. JORDAN LUMBER COMPANY, a Corporation,
Defendant in Error.

**Stipulation Under Rule 23, C. C. A.**

IT IS STIPULATED in the above-entitled cause between the plaintiff in error, by and through its attorneys, Logan & Childs, and the defendant in error, by and through its attorney, J. E. Erickson, that the exhibits certified by the clerk of the District Court may be omitted from the printed record, and the printing of said exhibits is hereby waived.

This stipulation is made under Rule 23 of the Circuit Court of Appeals.

Dated this 30th day of August, 1919.

LOGAN & CHILDS,
Attorneys for Plaintiff in Error.
J. E. ERICKSON,
Attorney for Defendant in Error.

[Endorsed]: No. 3382. In the United States Circuit Court of Appeals, Ninth Circuit. Northern Idaho and Montana Power Company, a Corporation, Plaintiff in Error, vs. A. L. Jordan Lumber Company, a Corporation, Defendant in Error. Stipulation Under Rule 23. Filed Sep. 8, 1919. F. D. Monckton, Clerk.

No. 3382

# United States
# Circuit Court of Appeals

## For the Ninth Circuit

---

NORTHERN IDAHO AND MONTANA POWER COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. L. JORDAN LUMBER COMPANY, a Corporation,

Defendant in Error.

---

**Upon Writ of Error to the United States District Court of the District of Montana**

---

# Brief of Plaintiff in Error

---

B. S. GROSSCUP,
SIDNEY M. LOGAN,
Attorneys for Plaintiff in Error.

LOGAN & CHILD,
Kalispell, Montana.

GROSSCUP & MORROW,
Tacoma, Washington.
Of Counsel.

Smith-Kinney Co. Printers, Tacoma

No. 3382

# United States
# Circuit Court of Appeals

For the Ninth Circuit

---

NORTHERN IDAHO AND MONTANA POWER COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. L. JORDAN LUMBER COMPANY, a Corporation,

Defendant in Error.

---

Upon Writ of Error to the United States District Court of the District of Montana

---

# Brief of Plaintiff in Error

---

B. S. GROSSCUP,
SIDNEY M. LOGAN,
Attorneys for Plaintiff in Error.

LOGAN & CHILD,
Kalispell, Montana.

GROSSCUP & MORROW,
Tacoma, Washington.
Of Counsel.

No. 3382

# United States
# Circuit Court of Appeals

## For the Ninth Circuit

NORTHERN IDAHO AND MONTANA POWER COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. L. JORDAN LUMBER COMPANY, a Corporation,

Defendant in Error.

## Upon Writ of Error to the United States District Court of the District of Montana

# Brief of Plaintiff in Error

By this Writ the plaintiff in error seeks to reverse a judgment entered in a law action in the United States District Court, District of Montana, wherein the defendant in error A. L. Jordan Lumber Company was plaintiff and the plaintiff in error, Northern Idaho & Montana Power Company was defendant. A jury was waived and the case was tried by the Court. The Court ren-

dered an opinion (R. p. 146) in which is embraced findings of fact. While this Writ challenges certain findings of the Court for the reason that the same are not supported by the evidence, it is mainly based on the assignment that on the facts found by the court supplemented by the undisputed evidence, the judgment should have been for the defendant in the District Court.

For brevity we will call the defendant in error the "Mill Company," and the plaintiff in error the "Power Company."

The action was brought for damages resulting from the complete destruction by fire of the Mill Company's plant on Christmas morning, shortly after midnight, 1916.

The plant had been used for several years in the manufacture of doors, sash, interior finish and similar products. A wooden one story building 44x55 feet, a wing 20x70 feet and a "lean-to" 20x26 feet contained various articles of woodworking machinery, finished stock and stock to be worked. The machines had the usual accessories of blow-pipes and were driven by electric motors. The plant was located adjacent to the right-of-way on the north side of the main line of the Great Northern Railroad which runs at that place approximately east and west. (R. p. 22.) The night was cold. The ground was covered with snow. A strong northeasterly wind was blowing. A transcontinental Great Northern train westbound passed

at 11:20. The Great Northern station near the mill was closed shortly after and the operator went to bed. The dispatcher frequently turned away from the depot tramps and hoboes but does not remember whether he did so that night. The mill was not in operation on Sunday the 24th. Mr. Jordan was there about one o'clock. On leaving he locked the doors but did not examine the windows. The watchman left the building at seven o'clock on the morning of the 24th. He left the outside doors fastened. At that time there were hot ashes in the stove but no coals to speak of. Dust had accumulated in the mill during its six years' continuous prior operation. The windows were not inspected to see if they were securely fastened. (R. p. 29.)

The Power Company installed and maintained a three wire, three phase supply line leading from the high voltage sub-station in the village of Columbia Falls approximately one mile away terminating at a bank of three 30 K. W. transformers mounted about twelve feet high on cross arms extending between two poles forty-eight feet from the mill (R. p. 22). From these transformers the power line consisting of two wires extended into the mill where there was a cabinet containing a main line switch, and from that cabinet to seven motors each having individual switches. The light line tapped off at the low or secondary side of one of the transformers to which incandescent lamps

within the mill were attached. This light line extended into an adjacent cottage. Mr. Jordan before leaving the mill on Sunday observed that the main switch controlling the power line was open but the switch to the light line was closed. The wires of the light line inside the mill were contained in metal tubes or conduits. All the wiring within the mill and the light line leading to the adjacent cottage was installed and cared for by the Mill Company. Some time before the fire an electrical inspector for the fire underwriters, inspected the mill and ordered changes made in the electrical system. The making of these changes was turned over to Stiles, a witness on the trial, an employe of the Mill Company who, though not an electrician, undertook to carry on the work under the direction of the fire underwriters' inspector. This inspector, Mr. Mills, condemned the whole system and ordered that it be taken out at an early date. The conduit system which the inspector had ordered installed had been mainly put in but was not completed at the time of the fire. (R. p. 49.) The conduits in which the light wires ran had no metallic ground. Mr. Stiles says:

> "This was an uncompleted job. We were working on them at odd times. It was started some year or so before and I put it in as I had time. All the conduits in the lighting system within the mill were not in—most of them were."

Sub-division F, Rule 28, page 65 provides:

> "F. Must have the metal of the conduit permanently and effectually grounded to water-piping, gas-piping or other suitable grounds; provided that when connections are made to gas-piping, they must be on the street side of the meter."

This was not done. (R. p. 98.)

It thus appears that the work of remodeling the condemned lighting system inside the mill was not completed and that the metal conduits, were not grounded in accordance with the underwriters' rules for protection against fire. The testimony of Clingerman and Dow, not contradicted, is that the grounding of conduits has been since 1903 recognized by electricians as and is a necessary protection of light lines against fire hazard where the wiring is in conduits. (R. p. 125 and 139.)

The system was working satisfactorily and nothing occurred in the operation to indicate any disorder in the electrical apparatus down to the time of the fire. The voltage on the light wire fell when the motors were on so that lights became somewhat dim and a flat iron used in the adjacent cottage would not heat up satisfactorily. When the motor switch was off and the motors not running the iron became overheated and the lights brightened at times to the point of failure by reason of increased voltage. The expert witnesses, however,

all agree that this variation of voltage in the light line did not indicate any structural disorder. Mr. Kimmel, the Mill Company's expert, said he would not attach any importance to this variation of voltage—that it was just what he would expect at a plant located at the end of a line. He says:

> "I would not attribute to the variation of the light and heating of the iron to any disorder in the system." (R. p. 84.)

Mr. Clingerman explains on pp. 122 and 123 this variation of voltage in the light line attributable to the turning on and off of the motors, illustrating by a comparison with the varying pressure of water in a house supply where one spigot is running and then several more are turned open thereby decreasing the pressure and again increasing when all are closed except one. (R. p. 123.) Mr. Dow says the action of this flat iron and the lights is universal in installations of that kind. (R. p. 137.)

The only suggested defect in the apparatus prior to the fire sustained by any testimony, was in a lightning arrester located about two hundred feet from the mill. Three lightning arresters were installed on the poles at this point, each having a metallic connection with the supply wires carrying the 2200 volt pressure to the transformers. It is the function of these lightning arresters to carry off any excess shocks such as would

be occasioned by lightning striking the wire. Prior to the fire there was nothing to indicate any disorder in these lightning arresters. There is no testimony to show that they had not been properly inspected. According to custom lightning arresters are usually inspected about once a year, generally in the spring. (R. p. 84.) About a month after the fire Utter, a witness for the Mill Company, at the time engaged in reconstructing the plant, and Stiles, who had had charge of the electrical installation before the fire, inspected these lightning arresters. Stiles says:

> "I saw there had been a charge through the lightning arrester, and that the cylinders were melted and pitted and in a smoky condition." (R. p. 52.)

> "It seems that the first cylinder and the second one—that is the whole block had been dropped and the first cylinder had been suddenly jammed close to the second one and from there on they were equally spaced all right * * *. The cylinder, as well as I can remember, was suddenly dropped so that it had struck the floor or some other object, and was suddenly jammed against this one so that there was no air gap between them. The third cylinder indicated that lightning had gone through it to ground. To test the lightning arrester we used a small transformer and put it in connection with the line on both ends, stepping 110 volts to 2000 volts and she skipped through and continued to work—continued

> to circuit. That indicated that the lightning arrester was in bad condition." (R. p. 47.)

These witnesses placed the lightning arresters back on the poles. They were subsequently taken down by employes of the Power Company, stored away and brought into court. The witnesses who took them down stored them and brought them into court testified that there was no change in their condition from the time they took them down. From an inspection of these lightning arresters in court it appeared that one of them had been subjected to a stroke of lightning. Mr. Kimmel, the Mill Company's expert, testified:

> "As that lightning arrester is now, it appears that it would perform its functions." (R. p. 74.)
>
> "As it now is, I believe that lightning arrester will work all right, that is, it would probably perform its functions. Of course we cannot look into the inside of these carbons, but I think that it would carry the current around and not interrupt the flow of current. I cannot say that this particular lightning arrester would leak much current in the condition it is in." (R. p. 55.)

The lightning arrester consists of a series of brass cylinders about half an inch long, a quarter of an inch in diameter inserted in a porcelain back. These cylinders are normally set so as to allow an air space between them; a little greater than the thickness of an ordinary piece of paper. A wire ex-

tends from the main conducting wire to the top of this row of cylinders and another wire from the last cylinder to the ground. The air space between the cylinders has the effect of insulating one from the other except under unusual voltage when the current will pass from one cylinder to the other arcing through the space between them. This arcing causes what is termed "blistering" and discoloration of the cylinders. It is not contended that an electrical current would throw these cylinders out of place or in any way have the effect of closing the air gaps between them. A displacement which would close the air gaps would necessarily be the result of some force other than electrical. The witness Stiles has attributed the displacement, if one existed, to a fall. These arresters had been on the poles from the time the plant was installed, encased in wooden boxes. It is difficult to say how the cylinders could have become displaced. There is no attempt to explain how or when they became displaced. It is just as fair to suppose that the displacement occurred in the period after the fire and before this inspection by Stiles and Utter, about a month, while the premises were practically vacant, as to suppose that the displacement occurred before. According to the testimony of Utter if the displacement of the cylinders occurred before the fire it would have an effect upon the operation of the machinery. (R. p. 38.) No such effect is shown.

The hypothesis that this lightning arrester was out of order at the time of the fire is a remote inference rebutted by the normal action of the apparatus up to that time, but, as we shall show later, even though this lightning arrester was in the condition described by Stiles prior to the fire, and even though that condition ought to have been discovered by reasonable inspection, (which is distinctly negatived by the testimony of Kimmel and not supported by the testimony of any witness), this lightning arrester in good or bad condition, had nothing to do with the cause of the fire.

The fire was discovered about 12:10 by the Great Northern telegraph operator and about the same time by a woman residing in the cottage adjacent to the mill. At that time the entire interior of the mill was ablaze so that it is impossible to locate any point where it started.

The complaint charges that the defendant (the Power Company) did not discharge its duties.

> "but in violation of its said duties carelessly, negligently and unskillfully wired said premises, and carelessly, negligently and unskillfully installed said electrical apparatus and appurtenances, and carelessly and negligently failed to keep and maintain the same in good repair, and carelessly and negligently permitted the said electrical apparatus and fixtures to become worn, damaged and defective, all of which was well known to the defendant, its agents, and employes; and by reason of said carelessness and negligence, such great voltage

> or load of electricity was carried to and upon the wires upon and within the premises of the plaintiff, and by reason of said excessive voltage and overloading of wires, and without any fault of the plaintiff, the said building, contents and property of the plaintiff * * *"

were destroyed.

These allegations were all denied by the answer.

The plaintiff assumed the burden of proof upon the issue charging that the proximate cause of the fire was "great load or voltage of electricity" carried to and upon the wires in the mill. It voluntarily tendered the issue that *it was free from fault.* In the view of the case taken by the District Court it becomes important to note that the plaintiff alleged that it was "without any fault" which allegation the defendant denied thereby creating an issue of fact just as effectually as the issue would have been created by the defendant charging that if the fire was electrical in origin it occurred through the contributing fault of the plaintiff. The District Court found as a matter of law that he could not consider the confessed contributory negligence of the plaintiff because the defendant had not pleaded contributory negilgence. The complaint lays the cause of the fire in an overload of the secondary wires. The answer denies an overload. This was the primary issue on which the trial court found with the

defendant. But disregarding the issue made up by the pleadings the District Judge found that the Power Company and the Mill Company by concurrent negligent acts burned the mill by some other means, each contributing to the result.

We claim that it was error in the District Court to decide the case upon a new issue without amendment and without notice and at the same time hold that we are barred from the benefit of the facts proved by the plaintiff, which if pleaded, would defeat a recovery.

When the plaintiff failed to support the fundamental allegation of its pleading the case should be dismissed, or if tried on a new issue without new pleadings should be decided on the evidence.

## ARGUMENT

Was the fire of electrical origin?

If of electrical origin, was the fire attributable to any of the apparatus installed and maintained by the Power Company?

If the fire was attributable to any part of the apparatus installed and maintained by the Power Company was the defect in the apparatus so installed the proximate cause of the fire or merely a condition which made defective apparatus installed by the Mill Company an operative and proximate cause?

If there was any defect in the apparatus installed by the Power Company, how long had the defect been in existence and was there any negligence in failing to discover its existence?

The Mill Company having failed to prove that the wiring on its premises was overloaded by a current of an excess voltage as charged in the complaint, and having shown that the apparatus in the mill was defective and required overhauling, which work was in progress but was not being done in the manner required to protect against fire hazard, and having shown that in order to start an electrical fire there must have been on its premises and under its control one accidental ground which was a fire hazard, and the fire was attributable to this accidental ground acting in conjunction with either another accidental ground in the apparatus of the Power Company or another accidental ground in its own apparatus, (two accidental grounds being necessary to a fire), does not the hypothesis of an electrical fire find its support either in the contributing negligent acts and omissions of both parties or wholly in the negligence of the plaintiff?

The District Court found that the fire was of electrical origin because no other source of origin has been proved. We submit that aside from the mere presence of a 110 volt electric lighting potential inside the mill there is nothing to lead to the conclusion that electricity had anything to do

with the origin of this fire. The power line was dead. It had been cut off at the main switch. There were no lights in the mill. The occupant of the cottage had gone to bed more than an hour before and had put out all her lights so that there was no current on the light line, merely a potential, by which is meant the presence of conditions to start a current upon establishing connections between the positive and negative wires.

It is important to bear in mind that this lighting current originates in the low or secondary side of the transformer.

As explained by Mr. Kimmel, with the aid of Exhibit 3, beginning at page 56, the transformer consists of two compartments each enclosed in chambers so effectually insulated from each other that there is no leak of the electric current from one to the other. A transformer may be compared to two cells in a dungeon, the walls of which are absolutely impenetrable. The force operating in one cell or chamber induces a corresponding force in the other cell. This induced force results in an independent current of electricity leading to and from what is known as the secondary cell. The current, therefore, leading into, through and out of the primary cell is entirely independent of the current leading from the secondary side out through the lighting wire, the lights and other apparatus attached and back into the secondary side. As long as there is no puncture of the cell walls, or

defect in the apparatus resulting in an arc around the chambers of the transformer, there is no possibility of overloading the low voltage system to which lights are attached and the low voltage to which the motors when running are attached from the high voltage current leading into the opposite or primary side of the transformer.

The electric power flowing in the primary circuit of a transformer is transferred to the secondary circuit and thence out of the transformer to the point of use by magnetism circulating in the iron core of the transformer. A comparison is a steam boiler in which the heat energy from the fire is transferred into heat energy in the steam through the iron shell and tubes of the boiler, there being no actual contact between the flame and the steam.

Mr. Jordan, manager of the Mill Company, told his experts Kimmel and Utter that when he arrived at the premises there were two separate simultaneous fires, one was consuming the mill, the other burning the transformer. (R. p. 66.)

From this, these experts drew the inference that the fire in the transformer was the result of internal electrical disorder. This inference was shown by positive testimony to be wrong and the testimony of Mr. Jordan was found by the Court untrue.

The hypothesis of a disordered transformer based on impeached testimony and finally dis-

carded by the trial judge was the foundation on which this Mill Company's case was built.

Upon this hypothesis experts Kimmel and Utter constructed the theory that the primary high voltage current, in place of stopping at the transformer, had found its way through a puncture or some other disorder into the light wiring which became overloaded, and finally found an outlet to the ground through the blower-pipes or some other high resistance conductor by means of which heat would be generated or a spark would be caused. Having found the earth the current would take the course of least resistance in its effort to get back to the primary line, which might be through the defective lightning arrester, a tree or any accidental connection between the earth and a primary wire.

This was their case. Its foundation rests upon the hypothesis that the transformer had broken down. The only basis for the hypothesis was the testimony of Mr. Jordan, President of the Mill Company. Mr. Jordan says that at about 12:10 he was notified in his residence of the fire. He had a mile to travel. The wind was blowing thirty-five miles an hour in his face. The snow was two feet deep. When he arrived the fire was blazing all over the mill and material was falling in. He could not look in the windows for the blaze inside. (R. p. 28.)

> "When I saw this transformer on fire, oil was bubbling out and burning. The transformer was about forty-eight feet from the building. Flames extended over from the building towards the transformers. The wind was blowing from that direction." (R. p. 30.)

A transformer is enclosed within a cast iron case. This case was filled with oil, which became hot, bubbled over and burned. This is the sole testimony on which the Mill Company's experts base their hypothesis that the transformer had broken down. We submit that the testimony, if standing alone, would in no way tend to support the hypothesis, but the testimony does not stand alone. One of the poles to which the cross arms supporting these transformers were fastened burned down (it was burning when Jordan got to the mill). This allowed the transformers to drop to the earth. The wires were then cut by one of the Power Company's employes and the transformers lay on the ground at the place for more than a month. Kimmel, the Mill Company's chief expert, had visited the premises. Utter, whose industry in tracing the cause of the fire led him to take down the lightning arrester was there. Stiles, who had charge of the interior wiring, was there. The case of one of the transformers was broken by its fall to the ground but none of them saw fit to make an examination to see if there was a breakdown or any other defect in any of these trans-

formers on which their hypothesis touching the origin of this fire rested. The Power Company, not in anticipation of any law suit, or not in the course of preparation against the possibility of a law suit, but solely because it had use for the transformers, employed an independent contractor, Arthur Moseby, whose testimony will be found at pages 100 to 110 of the Record, to test out these transformers. He did test them out under a pressure of 4000 volts—almost double the normal voltage, and found no leak or any other kind of defect. He examined them critically to see if there was any evidence of electrical arcing and found none. One of these transformers was placed in service and the other two in the Power Company's warehouse. After this law suit started the Mill Company's employes and experts were invited to test them out. There had been no change whatever in the structure of the apparatus. Kimmel was there; Utter was there, but neither of them saw fit to make a test. Moseby's testimony is supported by that of Grant and McDonald, employes of the Power Company. Mr. Dow, chief electrical engineer of the Montana Power Company, and Mr. Clingerman, chief electrical engineer of the defendant Power Company, both testified that the tests made by Moseby in the presence of Grant and McDonald would have revealed any defect in these transformers. The Court has found that there was no defect or other breakdown in the transformers.

The Court says:

"So far as plaintiff counts upon a defective transformer it has failed. The evidence does not persuade that the transformer was in any way defective. The complaint filed two months after the fire, contained only a "catch-all" charge of defective instrumentalities. Immediately after the fire plaintiff instituted investigation to fix liability upon defendant. Its manager testified he saw the transformer on fire indicating fire within it. But though these transformers fell to the ground by reason of their wires and poles burned by the mill fire, neither he nor any of his searchers for evidence even thought to examine them as they lay upon the ground, much less to test them, but passed them by, so they say, to examine and test the arresters. There and elsewhere they saw these transformers repeatedly, and yet they at no time did more than "casually" look at them. No other witness of several at the fire saw the transformer on fire. Plaintiff's principal expert on the scene early to sell motors, etc., to plaintiff, discussed the fire with the manager, but did not conclude that the fire was due to the current until over a year later when he heard an employe of defendant's say the transformer was on fire and another employe say one coil had been removed. It is inconceivable had the manager seen the transformer on fire within, that he would not have told his searchers and expert, and first proceeded to thorough examination and test of the transformer. It is apparent the said expert had no inkling of it until he heard the said employes as aforesaid. From all they knew and saw, plaintiff's witnesses doubtless concluded the mill fire alone had affected the transformer, until after the em-

> ployes' statements aforesaid. The charred appearance of the transformer, dragged from one of plaintiff's witnesses at the very end by gross leading, is more likely due to the mill fire.
>
> "The manager at the fire was not likely giving serious attention to the transformer. He could now easily confuse a pole afire or even oil boiling out and burning from the mill fire, with fire within the transformer." (R. pp. 149, 150.)

There is no real conflict of testimony, but if there was the Court's conclusion on this important fact should be given in this Court the same weight as would be given to the special finding of a jury.

When we eliminate the hypothesis that there was a breakdown in the transformer, the conclusion of Utter and Kimmel, that the fire was of electrical origin, is without support. Both of these witnesses sought to charge responsibility on the Power Company for the consequences of a breakdown in the transformer. Some electrical engineers claim that the secondary or low voltage side of a transformer should be connected with the earth by a low resistance metallic conductor—a wire is usually employed. This is called grounding the transformer. The function of this transformer ground is to carry away any current which might find its way through the transformer from the high side to the low side by reason of a breakdown. The grounding of a transformer in this way is

a protection against the consequences of an accidental breakdown. Accidental breakdowns are for the most part unavoidable and it is not claimed by these experts that the Power Company would be responsible for the consequences of an accidental arcing within the transformer attributable to some defect which might develop in that instrument, but to make their case it was contended that there was negligence in not providing safety means against the possibility of an accident to the transformer. Clingerman and Dow, the electrical experts for the Power Company, testified that such a ground wire on the low side of the transformer would have a tendency to increase the fire hazard while it would decrease the hazard of personal injury, and that therefore it was the usual practice to install a ground wire as a protection of persons coming in contact with the light lines, motors and other apparatus in case of a breakdown in the transformer. The record contains much discussion relating to the desirability of such a ground wire at the low side of a transformer, but all this testimony is of no consequence in view of the finding of the Court supported by the overwhelming preponderance, if not the uncontradicted testimony that the transformer did not break down but was in perfect order.

The experts for the Mill Company attempted to fasten responibility upon the Power Company for the breaking down of the transformer by claim-

ing that the defective lightning arrester may have been responsible for the breakdown. Throughout their case they make a disordered transformer the active agent in causing the fire. Utter, while not so clear as Kimmel, connects this so-called defective lightning arrester with the fire, but he is clear upon the point that it could have had no connection with the fire unless there was a defect in the transformer. He says:

> "I should say it would be pretty near necessary for there to be a defect in the transformer if the system worked before. * * * It is liable to cause an excessive current." (R. p. 38.)

Kimmel's testimony is all based upon the assumption that the transformer was on fire and that the fire in the transformer was independent of the fire in the mill; that the fire in both the transformer and the mill was caused by an arcing of the high voltage to the low voltage wires. He says:

> "Well, the transformer was described to be afire at the same time the mill was afire, and in addition to that, there were two simultaneous fires. One in the transformer and one in the mill. That, to my notion, would tend to make me believe that an arc through the one caused the fire in the other. An arc through the transformer caused the fire in the mill." (R. pp. 66, 67, 86, 87.)

The hypothesis on which Kimmel's conclusion is based having failed the conclusion fails also. Mr. Kimmel's thought seems to be that if the high voltage current was leaking through the transformer to the low voltage wiring this defective lightning arrester would afford one connection between the high voltage wires and the earth and a second connection might be established between the overloaded light wire and the earth through the blowpipes or through machinery in the mill and that this second connection, being what is known among electricians as an accidental ground, would not be a perfect conductor and on that account there would be liability of heating or sparking. Where two members of the line were not in perfect contact the electricity jumping from one to the other would cause a spark and if combustible dust was present might start a fire. The substance of his thought is that this defective lightning arrester was a condition affording one ground; that the second ground inside the mill which caused the fire was through some of the machinery in the mill and the high tension current passing through this machinery was likely to arc or cause heat. This idea seems to have caught the Court. But the whole theory vanishes in the face of the evidence and the Court's finding that there was no leak through the transformer. Kimmel's logic is right if his hypothesis had been right, but his hypothesis was wrong. The Court's finding of fact that the transformer was in perfect

working order and therefore an effectual circuit breaker, destroys the Court's conclusion that the lightning arrester was a connecting link in the circuit. There could have been no circuit through a sound transformer. Expert Kimmel assumed something which was not a fact. The Court overlooked his own finding that Kimmel's assumption had no basis in the evidence.

Mr. Clingerman, an engineer of high standing, holding a responsible position with one of the largest electrical engineering organizations in the United States, testified:

> "I should say that if the fire was an electrical fire, it probably would have happened whether or not the lightning arresters were there or not, and it would make no difference whether the lightning arrester was in the sort of order that Mr. Utter described it, or in its present order. In other words, the condition of that lightning arrester, in my opinion, does not enter into consideration at all, as to whether it was an electrical fire or otherwise. I don't think it has any probable bearing on the cause of the fire." (R. pp. 124, 125.)

Mr. Dow, chief electrical engineer of the Montana Power Company, the largest electrical operator in the central west, testified that the condition of the lightning arrester described by Mr. Utter was not a probable cause of the fire. (R. p. 138.)

As we have shown, the two experts called by the Mill Company, Kimmel and Utter, connected

the disordered condition of the lightning arrester, if such disorder existed, as a contributing cause of the fire only in case the transformer was out of order. It having been shown beyond a reasonable doubt, and it having been found by the Court, that the transformer was not out of order, their testimony ceases to have any weight because it is based upon a hypothetical ground which had no basis in fact. It irresistably follows that there is no testimony in the record tending to show that the lightning arrester was even a contributing cause of the fire. The fire, therefore, was either not electrical in origin or if electrical in origin, the cause is to be attributed solely to some accident occurring within the lighting circuit installed and maintained by the Mill Company.

The Court has found that the installation inside the mill was so defective that it was condemned by the fire underwriters' inspector. The Court says:

> "Within the mill the instrumentalities were plaintiff's. A year before the fire they had been condemned by the insurance underwriters, and they were still in process of uncompleted change at odd times by plaintiff's planerman and men supervised by him. It's a resistless inference that the system within the mill was a fire hazard, because of which plaintiff was without insurance at the time of the fire." (R. pp. 147, 148.)

This finding is supported by the testimony of the planerman Stiles. (R. p. 49.)

It is stated that it requires two grounds to make a circuit. In electrical language the word ground does not mean earth. It means a base through which the current may pass from the positive to the negative wire. In alternating current each wire becomes alternatingly positive and negative. In a lighting circuit, therefore, unless there are two grounds there is no current of electricity. The wires are dead. The potential energy, which upon the establishment of a circuit (an electrical conductor connecting the two wires) starts the flow of a current, is in the secondary or low side of the transformer. The electrical force present on the high side of the transformer by induction produces current on the low side. Electrical current is the result of force. A generator produces the flow of electrical current as a result of the force generated by steam or water power. On the secondary side of the transformer the current may be said to be generated by the force of the electrical current on the primary or high side of the transformer. When a circuit is established either by connecting the two wires of the lighting circuit directly together, which is called a dead short circuit, or by connecting them through the intermediate means of some high resistant material, the potential inductive force in the transformer becomes operative and a current flows through the wires—in the case of direct current going out through one wire and back through the other, and in the

case of alternating current passing in one direction momentarily out through one wire and back through the other and then in the opposite direction. A familiar illustration of two grounds in a lighting circuit is the ordinary electric lamp. When the lamps are all turned off there is no current. There is no conducting substance between the wires through which a current can move. When the light switch is closed one of the electric wires leading to the lamp is connected with the high resistant thread within the glass globe and the other end of this thread is connected with the other wire. A current is thus established through the high resistant thread whose temperature is raised to a white heat and light results. This is the normal action of a lighting circuit.

Enlarging the illustration, let us suppose that an intentional ground has been established from one of these light wires at the transformer, as the Mill Company's experts contend the proper practice requires. This ground wire leading to the earth under normal conditions would be simply a dead end for the reason that the other wire of the lighting circuit would not have any electrical connection with it and without a circuit there could be no current. Its only function would be to take care of any leak of current through a disordered transformer, carrying that current to the ground which would afford a medium for carrying the current back on to the wires on the high side through

another ground on that side. The normal function of such a ground at the transformer, according to all the testimony, is simply to take care of an accident resulting in the breaking down of the transformer, and in that contingency it is a safety device, but as there was no breakdown in the transformer in this case if such a ground had been present it would have been without function. The Court has found that such a ground at the transformer would have increased the fire hazard. This finding of the Court is right and is supported by the testimony of Mr. Clingerman. There was, therefore, no negligence in the failure to provide this ground.

To guard against short circuiting through metal conduits the fire underwriters have specified that the conduits must be connected with the earth by grounds. The probability of shorts through the tubes is suggested by the existence of the rule laid down by the underwriters. Their large experience in the investigation of fires led their engineers to provide reasonable precautionary measures. The Mill Company in this case had not provided the precautions imposed by the rule and good practice.

The District Court found that the failure of the Mill Company to ground its conduits was negligence. If the fire was electrical, that negligence was a probable proximate cause.

If, for the sake of argument, we concede that the lightning arrester was in bad order there is

absolutely no proof tending to show when it was disordered. Stiles says from its appearance it had suffered a fall or jar throwing the upper cylinders in contact with each other. The evidences of electrical action were blistering and discoloration of the metallic cylinders, but all the experts agree that this would not have influenced the normal functioning of the apparatus. If the cylinders were displaced through a fall or jar, when did such fall or jar occur? About a month elapsed between the fire and the examination made by Stiles and Utter. In some way the cylinders got back to their normal position before they were taken down by the Mill Company's employes. According to Kimmel, these arresters are not inspected more than once a year and that usually in the spring-time before the lightning season. Anyone acquainted with the Rocky Mountain country where this accident occurred, knows that frequent electrical storms occur between spring and winter. It was not electricity that destroyed the functioning of this instrument. The fall or jarring of a lightning arrester situated in a case fastened up ten feet or more on a pole is not the kind of an accident a prudent man would anticipate, therefore there was no negligence in failing to discover its condition, if it was out of order at the time of the fire. But there is absolutely no evidence that it was out of order at that time. The whole plant was working normally.

The case of *San Juan Lighting Company vs. Requena*, 224 U. S. 89, cited by the District Judge in support of his conclusions, does not appear to us to be in point. In that case the proof was clear that the light wires which entered the deceased's house were charged by the high voltage current through disorder in the converters by means of which the current was reduced from 2200 volts to 110. A converter does not act on the same principle as a transformer. Where a converter is used there is a continuous current through the converter reduced in pressure by means of parallel or multiple wires. A converter performs the same functions as a transformer but in a different way. In that case the converter failed, causing an overload of the light wires. The Mill Company tried to come within that case by assuming a disordered transformer. In this they failed. In that case the accident could not have happened without an over-load of high voltage current. In this case there is no evidence that the light wires became subjected to more than normal current, which might cause a fire through two defects in the light wiring.

Another distinction between the two cases is that in the San Juan case it was affirmatively shown that the inspection was negligently performed, while in the case at bar there is no evidence of negligent inspection. The presumption is that the Power Company did its duty and carefully inspected these lightning arresters at proper times.

The fact that the lightning arrester one month after this fire, during which month the premises were virtually abandoned, showed that it had suffered some kind of a jar does not impute negligent inspection. To so hold would carry the doctrine of *res ipsa loquitur* far beyond its application in the San Juan case or any other case of which we have knowledge.

The judgment of the District Court involves some kind of a connection through the ground, a distance of about three hundred feet, between the supposed defective lighting arrester and the disordered wires inside the mill. There is no support in the record for this assumption. The circuit to which the lightning arrester was connected is independent from the lighting circuit. A current leaking through the lightning arrester would find its way back on to its own system of circulation. That system of circulation was the line between the transformers at the Jordan mill and the transformers at Columbia Falls where the current is stepped down from the main primary 35,000 volt line to the 2200 volt line. A lightning arrester with its cylinders tightly jammed would operate in the same way as a solid wire and would be a dead ground. If the cylinders were only partially jammed we would have a partial ground, but the difference is one only of degree. A ground would not affect the working of the apparatus or disorder the current on these 2200 volt wires unless a

current should be established through a second ground. This current might be established by contact of one of the wires with a tree as explained by Mr. Kimmel, or it might be established through a defective transformer and an accidental ground in the mill. But as Utter says, this last hypothesis involves a defective transformer and as the transformer was not defective the hypothesis has no basis. If the current circulated through the defective lightning arrester, thence through the earth to a tree and back to the wires, it could have no influence in causing a fire in the mill. The diagram on the page following this brief as an appendix illustrates why unbroken insulation between the primary and secondary circuits negatives any possible agency of the lightning arrester in causing a fire.

The District Court has cited in support of the judgment, notwithstanding contributory negligence of the Mill Company, the case of *Le Roy Fiber Company vs. Chicago, Milwaukee & St. Paul Railway*, 232 U. S. 340. The case is clearly distinguishable from the one at bar. In that case a burning cinder was thrown from a locomotive on to a stack of flax straw on the private premises of the owner of the straw. The confessed agency causing the fire was the defective condition of the locomotive stack. The question was whether the owner of the straw could be defeated from recovery because he placed the stack in such proximity to

the railroad that it would have been safe with normal operation of the engine. The Court held that the defendant was not to be defeated from recovery by his failure to anticipate the negligence of the railroad company and that he had a right to stack his straw within a safe distance under conditions of proper operation of the railroad. In that case the negligence of the railroad was the proximate cause of the fire and it was held that the owner of the stack was not negligent in failing to anticipate the negligence of the railroad company. The case, properly analyzed, does not present a question of contributory negligence at all. It simply holds that the owner of the stack was not negligent and that, therefore, the loss was wholly the result of the negligence of the railroad company. The opinion indicates that a different result would have been reached if the straw stack had been placed so close to the track that it was liable to be burned with the engine in normal condition.

In the case at bar, in its most extreme view, the fire was caused by the negligent conditions within the mill, co-operating with the negligent condition of the lightning arrester. We can find no testimony to support this inference but for the sake of the argument let us concede its possibility. The Judge starts with the assumption that one accidental ground existed through negligent construction in the mill, but:

> "The plaintiff's defective instrumentalities would not set fire until two grounds occurred in the mill. The probabilities are two to one in favor of the theory that the arrester operating with one ground in the mill, as it would, is the cause of the fire." (R. pp. 148, 149.)

To measure the relative probability of different suppositions which may account for a fire, the origin and cause of which is unknown, by numerical proportions appears to us to be carrying speculation to the limit. But the Judge has fallen into a mathematical error. He starts with the assumption that immediately before the fire there was one accidental ground of the light wires for which the Mill Company was responsible. From this viewpoint he casts his eye for a second ground which will complete a circuit and make the flow of current possible. He finds the defective lightning arrester between which and the accidental ground in the mill there is an earth connection, but his circuit is not yet complete. It is broken at the transformer. To complete the circuit he must find two additional grounds which will bridge the insulation imposed by the transformer. In order to complete a circuit this second ground must in some way be connected with the light circuit, necessitating two accidental grounds in the light circuit. Before a current can flow through that circuit to the primary wires a second ground in the primary circuit must exist—in all four grounds, three in

addition to the arrester. Probabilities are reversed.

The reasoning of the Court is condemned by the Supreme Court of the United States in *Patton vs. Texas & Pacific Railway Co.*, 179 U. S. 658. While that is a case involving the injury of an employe, the rule as to the burden of proof would not be different in a case like this where there is no such relation. The burden is on the plaintiff to make out his case by a fair preponderance of the evidence.

> "It is not sufficient for the employe to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was, and where the testimony leaves the matter uncertain and shows that any one of a half dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half dozen causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is one of the many cases in which the plaintiff fails in his testimony." (pp. 663, 664.)

The law will not sustain a decision based on remote inferences.

*Bank vs. Stewart*, 114 U. S. 224.

*Shaw vs. New Year Gold Mines Co.*, 31 Mont. 138;

*Andre vs. Anaconda Copper Mining Co.*, 47 Mont. 554.

But for the sake of argument let us again take the most extreme view and concede that the current which caused this fire passed through a negligently contructed lightning arrester, negligently maintained and negligently inspected, thence along or through the ground to the saw mill, and thence through an accidental conductor to the negligently installed wiring, and thence by some unknown conductor through two more accidental grounds to the primary wires, completing the circuit, has the Mill Company a right of recovery? A more perfect case of contributory negligence can not be imagined. The damage is the result of the contemporaneous co-ordinating act of two negligent parties. Without the negligence of both the damage could not have occurred. An analogy is the ordinary collision case where both parties violate the rules of the road.

This was apparently conceded by the trial Court but he says the defendant did not plead contributory negligence and therefore cannot avail itself of the fact that its negligence would not have caused the fire if the plaintiff by active participation had not joined in the negligent act. The complaint in this case charges that the fire was

caused wholly by the acts of the defendant and without any fault on its part. The defendant denies both of these allegations and thereby makes an issue. We concede that ordinarily contributory negligence must be affirmatively alleged and proved, but when the plaintiff has tendered the issue by alleging that it was without fault, and that issue is made up by a denial, it would seem unnecessary to repeat the allegation. The criticism of the answer is of form not substance. The plea of contributory negligence is not like the plea of minority, or the statute of limitations, or the statute of frauds, which rest upon privilege to be taken advantage of or not taken advantage of as the case may be. The matter of pleading merely involves the burden of proof and it is the uniform practice that where the plaintiff has proved contributory negligence the defendant can rely upon that proof and the case will be dismissed.

In the case of *Melzner vs. Raven Copper Co.*, 47 Mont., 351, the Supreme Court says:

> "Now, as before the passage of the Act, if the employe was guilty of contributory negligence, that is a defensive fact to be asserted and shown by the defending employer, unless it appears from plaintiff's own pleading or *proof*." (Italics ours.)
>
> "It is a rule now well established in this state, that the defense of contributory negligence, in order to be available to the defendant, must be specifically pleaded unless such contributory negligence appears from

the allegations of the complaint or unless the plaintiff's own case raises a presumption of contributory negligence."

*Birsch vs. Citizens Electric Co,.* 36 Montana, 574; 93 Pac. 940.

To the same effect:

*Brown vs. Oregon R. & Nav. Co.*, 41 Wash., 692.

This case quotes with approval from *Bunnell vs. Rio Grande R. Co.*, 13 Utah, 314:

"Generally, contributory negligence is a matter of defense, and must be alleged and proven by the defendant; but where the testimony on the part of the plaintiff, who seeks to recover damages for injuries resulting from negligence, shows conclusively that his own negligence or want of ordinary care was the proximate cause of the injury, he will not be permitted to recover, even though the answer contains no averment of contributory negligence."

Where due care of the plaintiff is alleged in the complaint a general denial raises the issue of contributory negligence.

3 Foster's Federal Practice, par. 454.

The Court says the Mill Company created a fire hazard by turning loose a wild current of electricity, but says that the Power Company also turned loose a wild current and the two in some way not suggested, found a connection and travel-

ed over a completed circuit. Both suppositions impute negligence of the plaintiff. Legally, it makes no difference whether that negligence was the whole cause or a contributing cause.

With Jordan's story of seeing the transformer on fire out of the case the inference of an electrical fire is remote and has no basis except in the defective condition of the wiring in the mill and that it was under the care of a man unskilled in the technical trade he was working at.

Tramps on a stormy cold night are not likely to deny themselves the shelter of an empty building containing stoves and plenty of cut fuel out of consideration of locked doors or windows which may have been unlocked. The strong northeasterly wind may have carried cinders from the stack of Great Northern train No. 3 in its westward course near the mill. Unexplained fires are constantly occurring.

The doctrine of *res ipsa loquitur* is not a part of the law of negligence in the Federal Courts or in Montana. Only by a sequence of facts established with reasonable certainty the judicial mind travels from cause to effect. It is not enough that a supposition is consistent with what happened. There must be a connecting link established by probative evidence.

Finally we submit that the cause of this fire is wholly unexplained, the plaintiff having failed to show that it originated in a burning or disorder-

ed transformer. If the fire was of electrical origin it was caused by no fault of the defendant. The most probable cause of the fire, if of electrical origin, was the disordered condition of the Mill Company's own lighting system. If any electrical instrument installed and maintained by the Power Company was defective it could not have been a proximate cause of the fire without the contributing negligence of the Mill Company.

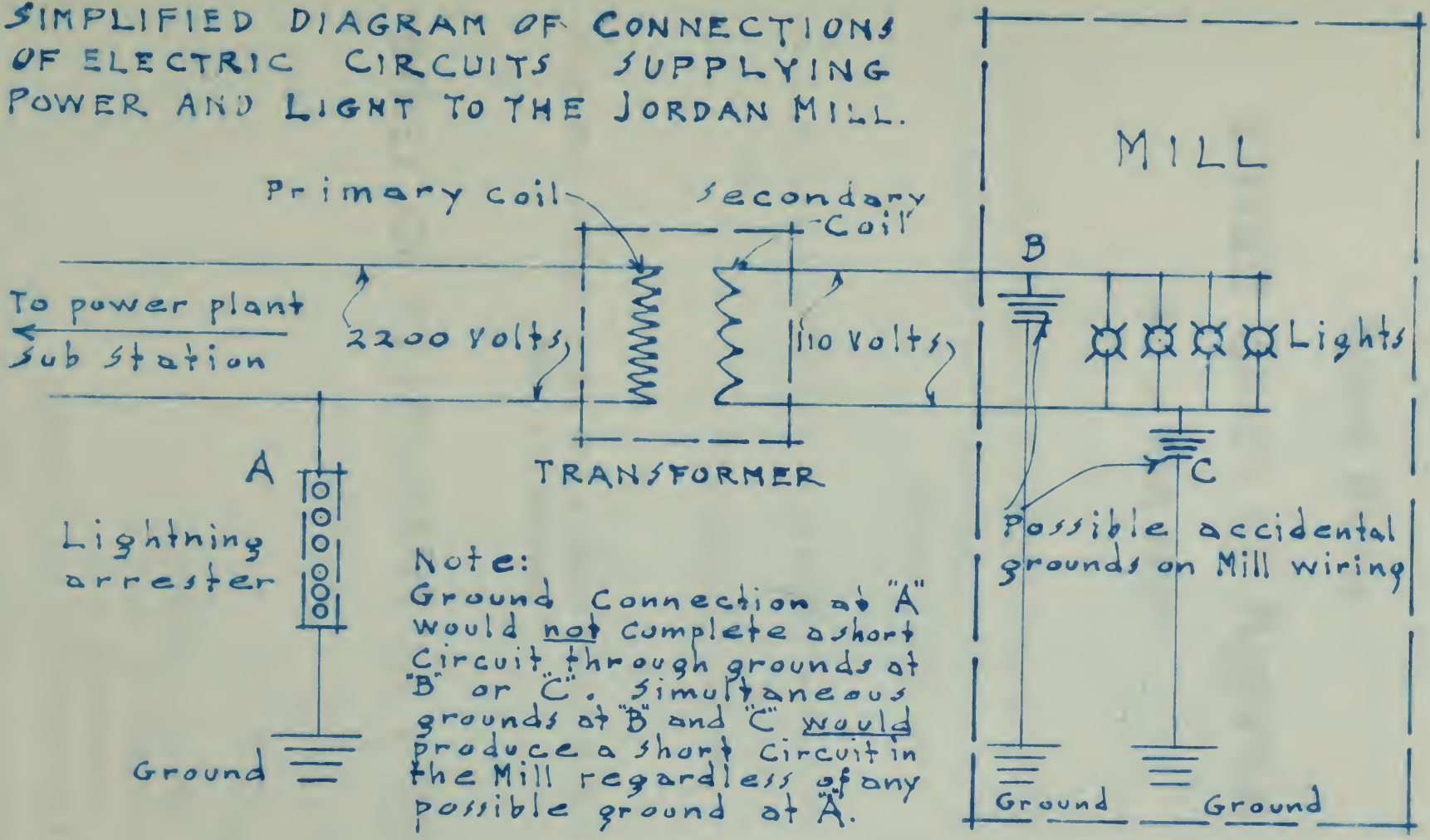
The judgment should be reversed and the case remanded with an order to dismiss.

Respectfully submitted,

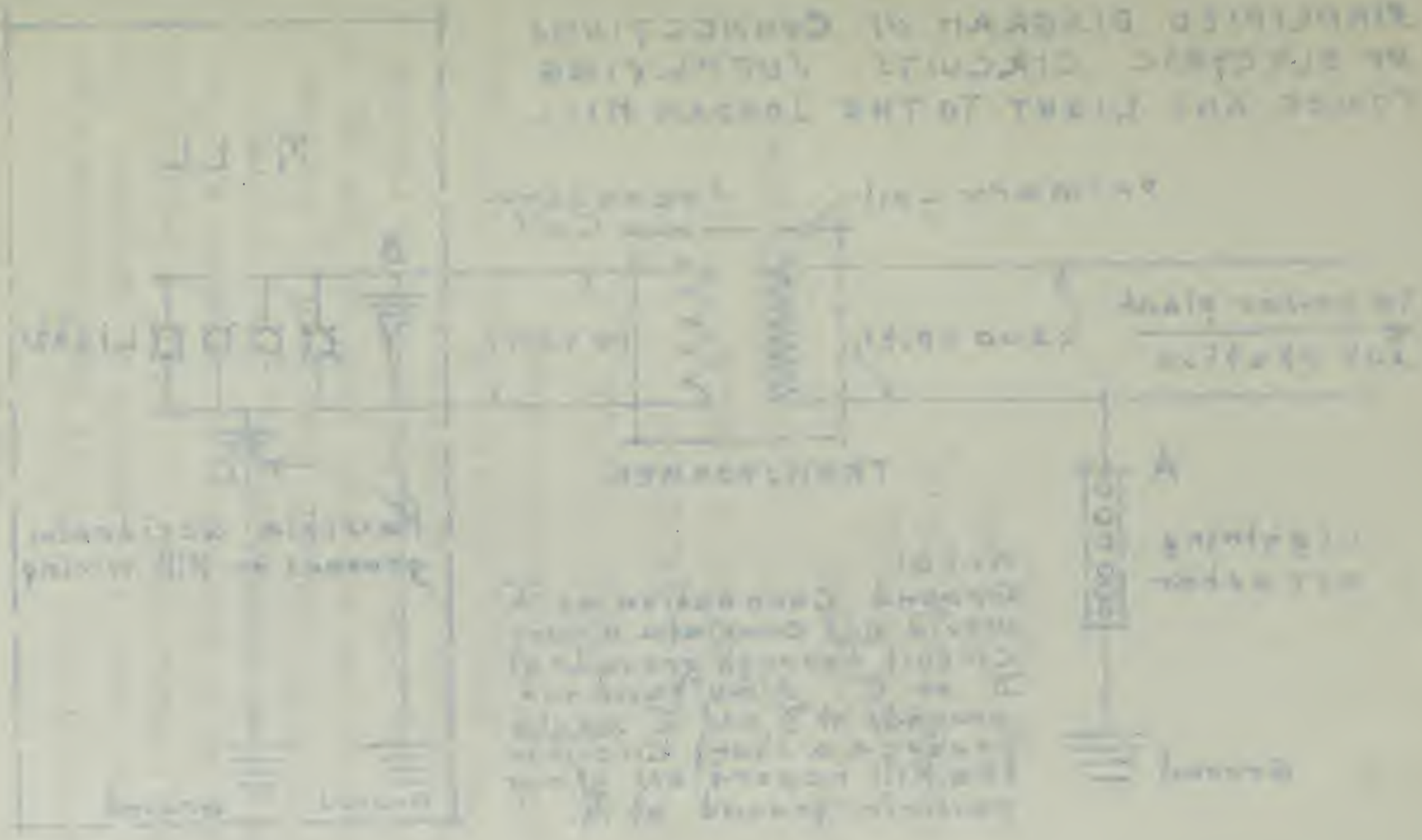
B. S. GROSSCUP,
SIDNEY M. LOGAN,
*Attorneys for Plaintiff in Error.*

LOGAN & CHILD,
Kalispell, Montana.
GROSSCUP & MORROW,
Tacoma, Washington.
Of Counsel.

# SIMPLIFIED DIAGRAM OF CONNECTIONS OF ELECTRIC CIRCUITS SUPPLYING POWER AND LIGHT TO THE JORDAN MILL.




Note:
Ground Connection at "A" would not complete a short Circuit through grounds at "B" or "C". Simultaneous grounds at "B" and "C" would produce a short Circuit in the Mill regardless of any possible ground at "A".



No. 3382

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

---

NORTHERN IDAHO AND MONTANA POWER COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. L. JORDAN LUMBER COMPANY, a Corporation,

Defendant in Error.

---

**Upon Writ of Error to the United States District Court of the District of Montana.**

---

# BRIEF OF DEFENDANT IN ERROR.

---

HENRY C. SMITH,
T. H. MACDONALD,
J. E. ERICKSON,
Attorneys for Defendant in Error.

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

---

NORTHERN IDAHO AND MONTANA POWER COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. L. JORDAN LUMBER COMPANY, a Corporation,

Defendant in Error.

### Brief for Defendant in Error.

The facts which gave rise to this case are fairly stated in the brief of the plaintiff in error and need not here be repeated. The case was tried to the Court, a jury having been waived by both parties, and resulted in a judgment for the plaintiff, defendant in error here, for the sum of $34,500 and costs. The plaintiff in error challenges the judgment and has brought the case to this Court on a writ of error for review.

Adopting the suggestion of counsel in their brief, we will call the defendant in error the "Mill Company" and the plaintiff in error the "Power Company."

While the Power Company has made numerous assignments of error, counsel evidently rely upon the

insufficiency of the evidence to sustain the judgment, they say in their brief:

> "While this writ challenges certain facts of the Court for the reason that the same are not sustained by the evidence, it is mainly based on the assignment that on the facts found by the Court supplemented by the undisputed evidence, the judgment should have been for the Defendant in the District Court."

The Court returned a written opinion which is found in the record (Transcript, p. 146). Aside from the opinion no special findings were made although the opinion refers to and discusses the facts upon which the order of judgment is made. In this entire record there is not, so far as we have discovered, a single exception to the admission or exclusion of testimony; at the conclusion of the case no motion was made by the Power Company for judgment on the ground that the Mill Company had failed to make a case against the Power Company. The question of the sufficiency of evidence was never raised and no attempt was ever made to obtain a ruling of the District Court on this question: no effort was made to point out or suggest to the Court wherein the testimony was insufficient to support a judgment for the Mill Company. Counsel are raising the question for the first time in this Court; they are asking the Court to review this record for the purpose of weighing the evidence and deciding whether or not the testimony as presented at the trial of the case was sufficient to support the findings of the trial court. The question

now presents itself will this Court, upon this writ, examine the record for the purpose of ascertaining the credibility of the witnesses, the weight to be given to the testimony and what the evidence does establish or does not establish? We understand the rule to be, except in cases where the sufficiency of evidence has been appropriately challenged and excepted to in the District Court, this Court will not go into these questions.

Section 700, R. S., provides:

> When an issue of fact in any civil cause in a Circuit Court is tried and determined by the Court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the Court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.

Corpus Juris, Volume 3, page 841 states the rule as follows:

> In the federal courts, "when an action at law is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it, and even then it is not reviewable unless a request has been made for a peremptory instruction, and an exception taken to the ruling of the Court." "When a jury is

> waived, and the cause is tried by the Court, the general finding of the Court, for one or the other of the parties stands as the verdict of a jury, and may not be reviewed in an appellate court unless the lack of evidence to sustain the finding has been suggested by a request for judgment, or some motion to present to the Court the issue of law so involved, before the close of the trial."

Numerous authorities are cited to sustain this rule, in fact there seems to be no exception to its application.

Consolidated Coal Company of St. Louis v. Polar Wave Ice Company is a case decided in the Circuit Court of Appeals of the Eighth District and reported in 45 C. C. A. page 639, decision by Thayer, Circuit Judge, the opinion in that case is in part as follows:

> This action was brought by the Consolidated Coal Company of St. Louis, the plaintiff in error, to recover a balance in the sum of $6,759.63, which was alleged to be due to it from the Polar Wave Ice Company, the defendant in error for a certain quantity of coal said to have been sold and delivered to the defendant in error. The defendant below denied that it was indebted to the plaintiff as alleged in its complaint, and pleaded several defenses to the cause of action, which need not be stated in detail. The parties to the cause subsequently filed a stipulation waiving a jury, and consenting to try the issue joined before the Court. The case was so tried, resulting in a judgment in favor of the defendant

against the plaintiff below in the sum of $5,016.82, the defendant below having by its answer interposed several counterclaims, which the trial court held to be well founded. Although the trial judge rendered a written opinion in the case, which if found in the record, but does not form a part of the bill of exceptions, he did not make a special finding of facts, but contented himself with a general finding. This Court has repeatedly held that when the finding is general, no questions are open for review on a writ of error, except such as may have been raised in the progress of the trial by exceptions taken to the admission or exclusion of evidence. It has also held that it will not treat an opinion of the trial court as a special finding of facts, which was obviously not intended as such, although the opinion may state certain of the facts where were developed at the trial. When a case is tried before the court, counsel cannot raise questions of law which will be reviewed on appeal as may be done when a case is tried to a jury. If the exceptions taken during the progress of the trial relative to the admission or exclusion of evidence do not present all of the questions of law which counsel desire to have reviewed, they should make a seasonable application to the trial court to have the facts found specially, which the court in its discretion may do, and incorporate the finding in a bill of exceptions. When such a finding is made and duly incorporated in a bill of exceptions, an appellate court is then in a position to

determine whether the facts as found warranted the judgment. But under no circumstances will this court examine the record with a view of ascertaining what the testimony establish or did not establish, except in that class of cases at the conclusion of all the evidence a request is preferred to direct a verdict for the defendant upon the ground that there is no substantial evidence to support a judgment against the .defendant. These propositions are so well established that a reference to a few only of the adjudged cases is all that is deemed necessary. Searcy Co. v. Thompson, 27 U. S. App. 715, 13 C. C. A. 349, 66 Fed. 92; Adkins v. W. & J. Sloane, 19 U. S. App. 573, 8 C. C. A. 656, 60 Fed. 344; Bowden v. Burnham, 19 U. S. App. 448, 8 C. C. A. 248, 59 Fed. 752; Trust Co. v. Wood, 19 U. S. App. 567, 8 C. C. A. 658, 60 Fed. 346; Insurance Co. v. Folsom, 18 Wall. 237, 253, 21 L. Ed. 827; Stanley v. Board, 121 U. S. 535, 547, 7 Sup. Ct. 1234, 30 L. Ed. 1000; Lehnen v. Dickson, 148 U. S. 71, 73, 13 Sup. Ct. 481, 37 L. Ed. 373.

In the case of Gibson v. Luther reported in Volume 116 C. C. A. page 35, the Court speaking through Adams, Circuit Judge, says:

"The bill of exceptions contains an opinion of the trial judge in which he discusses at some length the facts and law of the case, and counsel have assigned for error what they claim to have been the holdings, findings, and judgments of the court as reflected in that opinion.

"But this will not avail them. Errors are assignable in actions at law on rulings made or points of law decided and not on reasons given therefor. The opinion, even though it finds and comments on some of the evidential facts of the case in support of the conclusion reached, is not a special finding of facts within the meaning of the statute. But, if the opinion could be treated as a special finding of facts, it would not help the parties to this suit.

"The findings as made must stand if there was any substantial evidence to sustain them; and whether there was such evidence could be made reviewable on writ of error, only by presenting a request to the trial court either to make some declaration that there was no such evidence, and upon refusal by the court so to do, taking proper exception and assigning error thereon. There having been no request in this case for any such declaration of law in any form the finding of facts, even if it was such, cannot be challenged. Felker v. First National Bank of Cincinnati, just decided by this court and cases therein cited."

It seems that the rule as stated in the foregoing case is particularly applicable to the case at bar. There, as here, the trial Judge rendered a written opinion, commented upon and analyzed the facts in the case in support of the conclusion reached. The Court held that such an opinion could not be regarded as a special finding, but even if the opinion could be treated as a special finding of facts it would not help

the appellants, for the reason that the trial judge had been given no opportunity to pass upon the question of the sufficiency of the evidence.

See, also, case of Felker v. First National Bank, 116 C. C. A., page 32, where the Court holds:

> The next error assigned is that "the Court erred in finding that the plaintiff had purchased said drafts and was the owner thereof," and we are asked to review the evidence taken before the Court on that issue and reverse its finding. This we cannot do. When a jury is waived and a special finding of facts made by the trial Court, an appellate court cannot review the evidence to ascertain its preponderance on one side or the other. The findings as made must stand if there was any substantial evidence to sustain them.

The Pennsylvania Casualty Co. v. Whiteway et al., reported in 127 C. C. A., page 332 was a case tried before the Court without a jury and resulted in a verdict for defendants in error in the sum of $5,000. The verdict was challenged as not being sustained by the evidence and the action was brought to this Court on a writ of error. Gilbert, Circuit Judge speaking for the Court says in the opinion:

> "The burden of the argument of counsel for the plaintiff in error is that of the evidence overwhelmingly established the fact that Irwin was not a steel man, as he was classified in the policy, and as alleged in the complaint, but was a common laborer, and it ignores the effect of the judgment of the court below, which must be taken as

conclusively establishing the contrary, for there was no motion in the court below for a ruling or judgment on that question at the close of the trial, nor does any assignment of error challenge the finding of the Court on the evidence. When an action at law is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it, and even then it is not reviewable unless a request has been made for a peremptory instruction, and an exception taken to the ruling of the Court. When a jury is waived, and the cause is tried by the Court, the general finding of the Court for one or the other of the parties stands as the verdict of a jury, and may not be reviewed in an appellate court unless the lack of evidence to sustain the finding has been suggested by a request for a ruling thereon, or a motion for judgment, or some motion to present to the Court the issue of law so involved, before the close of the trial. There was no such request or motion made in the case in hand, and the judgment of the court below is therefore conclusive of the facts determined thereby. (Citing: Marginson v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; Wilson v. Merchants' Loan & Trust Co., 183 U. S. 121, 22 Sup. Ct. 55, 46 L. Ed. 112; Boardman v. Toffey, 177 U. S. 271, 6 Sup. Ct. 734, 29 L. Ed. 898; Barnard v. Randle, 110 Fed. 906, 49 C. C. A. 177; United States Fidelity & G. Co. v. Board of Commrs., 145 Fed. 144, 76 C. C. A. 114; Felker v. First Nat. Bank, 196 Fed. 200, 116 C.

C. A. 32; Bell v. Union Pac. R. Co., 194 Fed. 366, 114 C. C. A. 326.)"

We might continue to cite many more authorities to sustain the position, that there is nothing in this case for the Court to consider, but we think enough has been called to the attention of the Court to fortify our position.

If we assume, for the sake of argument, that this record is in such condition that the Court might properly review the evidence, then, we would invoke the general and well known rule that prevails in both Federal and State Courts, that findings of fact of a trial court based on conflicting evidence will not be disturbed on appeal. This rule has been adhered to by the Supreme Court of Montana (the State where this case was tried) from the organization of the Court to the present time. This rule was first recognized in the case of Ming v. Truett, first Montana, page 327, where the Court says:

> "The Court below, upon the trial, gave judgment for respondent. This Court must presume that the Court as the contrary does not appear upon the record, found facts sufficient to warrant the judgment. In other words, this Court must presume, as the contrary does not appear, that the Court below found that appellant did not receive these fees as probate judge, and as fees allowed him by law for performing the duties of his trust. This being found, $4 per lot of these fees were undoubtedly illegal, and the demanding and receiving of them, under our statute, was extortion.

"The testimony presented in the record is conflicting upon this point; and although it may appear to us that the weight of evidence was against the conclusion arrived at, the well-settled principles of law will not allow us, in such cases, to interfere.

"The Court below observes the witnesses, their character, their manner and the probabilities of their evidence, and is intrusted with the delicate and often difficult task of giving such weight to the testimony of each one as seems to him just and proper; and it must be considered by us that, in so regarding the evidence in the Court below, in this case it was found that the weight of evidence was in favor of the respondent."

The latest expression of that Court is found in the case of Matoole v. Sullivan, 55th Mont. 363, where the Court says:

"Where a verdict, based upon evidence in substantial conflict has the approval of the district court as shown by its denial of a new trial, the Supreme Court will not interfere even though the evidence as appearing in the record, seems to preponderate in favor of the appellant."

The first of these cases above cited was decided in 1871 and the last case was decided in 1918 and in all the time that has intervened between these decisions the Court has not varied in its position on this rule.

In the Circuit Court of Appeals this rule has received judicial sanction in cases too numerous to cite. In the case of Buckeye Powder Company v. Du Pont

Powder Company reported in the 139 C. C. A., page 319, the evidence as to the facts involved in the case was conflicting and the Court uses this strong and positive language:

> "We need not dwell upon the point that we have no power to determine (as we are asked to do) whether the verdict was in accord with the weight of the evidence, or to review the finding of the jury on any disputed fact. Our only business is to inquire whether the assignments of error that were properly taken disclose any material mistake in the trial. For this reason much of the plaintiff's argument must be laid aside as irrelevant; indeed, the brief contains so much that is nothing more than a conscious or unconscious attack on the verdict that we have not always found it easy to disentangle the questions of law that lie within our province from the question of fact that lie outside."

In Bowden v. Burnham, 8th C. C. A., page 250, we find the following language by Caldwell, Circuit Judge:

> "The record purports to contain all the evidence, and it is said in the brief filed on behalf of the plaintiffs in error that this Court can review the decision of the lower Court upon the evidence, and most of the briefs of counsel on both sides are taken up with the discussion of the evidence in the case. But, upon the record before us, we cannot look into the evidence. When a case is tried by the Court without a jury, a gen-

eral finding of the Court has the same effect as the verdict of a jury, and is conclusive in this Court as to the facts. Such a finding cannot be reviewed in this Court by a bill of exceptions, or in any other manner. It prevents all inquiry in this Court into the special facts and conclusions of law upon which the finding rests. Norris v. Jackson, 9 Wall. 125; Miller v. Insurance Co., 12 Wall. 285, 297; Insurance Co. v. Folsom, 18 Wall. 237; Martinson v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321; Boardman v. Toffey, 117 U. S. 271, 6 Sup. Ct. 734; Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481.

In Bursch v. Strongberg Carlson Co., 133 C. C. A., page 246, the Court takes the position that "The decisions of a Court in the trial of an action at law without a jury upon the weight of conflicting evidence are not reviewable in the National Courts." Citing Gibson v. Luther, 116 C. C. A., page 35.

The Supreme Court of California in Union Collection Company v. Rogers, 122 Pac., page 980 goes so far as to hold (quoting syllabi) "a finding supported by the positive testimony of one witness, which testimony is disputed by the adverse party, will not be disturbed although the reviewing Court would have made a different finding."

It was the peculiar province of the trial court to weigh conflicting testimony and to judge the credibility of the witnesses. He had the opportunity to observe the intelligence of the witnesses, and their interest, if any, in the result of the case; their conduct

or demeanor while testifying and their general demeanor on the witness stand; their means of observation and knowledge concerning the matters about which they testified and all the matters, facts, and circumstances shown in the trial bearing upon the weight to be given to their testimony. With all the evidence and circumstances fresh in his mind the learned trial court made his findings. From the opinion set out in the record on page 146, we gather that the Court found:

> 1. "Trial to Court, the Court finds for the plaintiff and against the defendant, and for damages in the amount of $34,500.
>
> 2. That the fire was caused by the electric current is demonstrated to a reasonable probability by a PREPONDERANCE OF THE EVIDENCE.
>
> 3. Contributory negligence is not pleaded and it does not appear.
>
> 4. The probabilities are two to one in favor of the theory that the (lightning) arrester operating with one ground in the mill, as it would, is the cause of the fire and is the proved negligence charged by the plaintiff against the defendant."

The finding of the trial Court, whether general or special, has the same effect as the verdict of a jury (Revised Statutes, section 649; U. S. Compiled Statutes 1918, section 1587).

The conclusion seems to be irresistible, therefore, that this judgment may not now be successfully attacked for two reasons, (1) because of the failure of

the Power Company, properly and timely, to challenge the sufficiency of the evidence and the conclusion reached by the trial judge in the court below, and, (2) because the record discloses the fact that the judgment is based on substantial evidence, although it may appear that in some instances, the testimony in the case was conflicting.

The Power Company's brief is occupied, almost entirely, by a discussion of the evidence. If in view of the foregoing, the Court should by any chance, consider such a discussion, at this stage of the action, we submit that there is substantial evidence to sustain the decision of the Court that the fire was of electrical origin and that no contributory negligence on the part of the Mill Company was shown. The Power Company sets forth in its brief in its statement of facts, on page 6, the following:

> "This inspector, Mr. Mills, condemned the whole system and ordered that it be taken out at an early date. The conduit system which the inspector had ordered installed had been mainly put in, but not completed at the time of the fire. (R., p. 49.) The conduits in which the light wires ran had no metallic ground."

It is to be noted that this system which was condemned by the fire insurance inspector was the system which was installed in 1910 by the Power Company. (See Transcript, p. 27.) The work done by Stiles for the Mill Company had all been accepted by the insurance inspector. (See Transcript, p. 48.)

"Mr. Mills was the electrician for the insurance underwriters, he had no connection with the Northern Idaho and Montana Power Company, and as I didn't claim to be an expert electrician and wasn't taking the whole responsibility on my own shoulders and AS FAR AS THE WORK HAD BEEN DONE, IT WAS REPORTED SATISFACTORY TO THE BOARD OF UNDERWRITERS."

The only unsatisfactory work, then, in the mill was the wiring which had previously been done by the Power Company. They contend, (p. 6 of the Brief of Plaintiff in Error) the conduits in which the light wires ran had no metallic ground, and attribute to us, negligence on that account, and contend that this negligence is shown by our own testimony. The testimony of the expert in the employ of the Power Company was to the effect that unless the neutral were grounded at the transformer, in the event of a breakdown at the transformer, the grounding of the conduit would create a fire hazard rather than the contrary, because of the arcing between the secondary of lighting wires, and the conduit itself. This would create an intense heat which would probably fuse the conduit and start the fire.

(See Testimony of Clingerman, Transcript, pp. 132, 133.)

"Now if that conduit was grounded there would be no arc formed between the conduit and the ground; that would not eliminate the arcing between these wires and the conduit, but the fire

hazard would not still exist as Mr. Kimmel states. If your ground exists on this side, this accidental ground and you have a good working grounding of the neutral outside of the mill which was admittedly not present in this case, your circuit would be complete between these two grounds, rather than running through the mill and arcing. IF YOUR NEUTRAL WERE GROUNDED BOTH THE ARC OUTSIDE AND INSIDE THE CONDUIT WOULD HAVE BEEN ELIMINATED IF THE PRIMARY AND SECONDARY WIRES WERE IN CONTACT."

It then becomes clear that there was no negligence in failing to ground the conduits when the neutral was not grounded. This undoubtedly accounts for the favorable report on Mr. Stiles' work as above stated.

We submit that no contributory negligence was pleaded, that no contributory negligence was shown by the testimony, whence none can be shown on the part of the plaintiff in error.

"Contributory negligence should be pleaded with the same degree of particularity as the acts of negligence relied upon in the complaint, but where it is not, and the trial proceeds without objection, upon the theory that it has been properly pleaded, it is too late to raise the question on appeal. Nelson v. City of Helena, 16 Mont. 21, 39 Pac. 905; Harrington v. Butte A. & P. Ry. Co., 37 Mont. 169, 16 L. R. A., N. S., 395, 95 Pac.

8; Coulter v. Union Laundry, 34 Mont. 590, 87 Pac. 973; Longpre v. Big Blackfoot Min. Co., 38 Mont. 99, 99 Pac. 131; Gleason v. Missouri River Power Co., 42 Mont. 238, 112 Pac. 394; Molt v. Northern Pac. Ry. Co., 44 Mont. 471, 120 Pac. 809.

"Contributory negligence must, as a rule, be alleged, unless it appears from the plaintiff's case. Hunter v. Montana Central Ry. Co., 22 Mont. 525, 57 Pac. 140.

"Contributory negligence must be pleaded. Orient Ins. Co. v. Northern Pac. R. Co., 31 Mont. 502, 78 Pac. 1036.

"Contributory negligence must be pleaded with the same degree of particularity as the plaintiff must plead negligence. Longpre v. Big Blackfoot Min. Co., 38 Mont. 99, 99 Pac. 131; Gleason v. Missouri River Power Co., 42 Mont. 238, 112 Pac. 394; Molt v. Northern Pac. Ry. Co., 44 Mont. 471, 120 Pac. 809.

"In an action for damages for injury of person, the plea of contributory negligence on the part of the plaintiff is a special defense which must be pleaded in defendant's answer. State ex rel. Montana Central Ry. Co. v. District Court of Eighth Judicial District, 32 Mont. 37, 79 Pac. 546."

The learned District Judge has mentioned in his comments that there is no evidence of a leak through the transformer between the primary and secondary windings. If the Court is to permit a reconsidera-

tion of the facts of this case it should bear in mind that the transformers were removed from the iron case before they were tested, that the insulator was burned on the outside at the points where it could come in contact with the transformer case, and that the wires were bare and the leads were bare in places, that the porcelain insulators between the leads and the case was broken.

Testimony of Arthur Mosby:

> "These leads were still on and we were careful, however, to keep the leads separated, because if they came together it would be short, this porcelain being gone. Of course I had no means of testing this transformer in the condition that it was when first found." (Transcript, p. 108.)
> "These leads here were all broken, this porcelain, I think, on both of them, and these leads were all bent together, so we took these leads and straightened them up and after he made a test he had me take all these leads and shellac them. I didn't do any winding on these coils."

Testimony of A. L. Jordan:

> "When I saw this transformer on fire oil was bubbling out and burning. The transformer was about 48 feet from the building, the wind was blowing from that direction. They could not get within 20 feet of the transformer."

It is a strange fact that the oil inside of a metal jacket was burning, bubbling up out of the inside of the transformer and that at the same time the mill was burning, and on a cold night with flames 20 feet

away from this paraffin oil. It is to be remembered, in connection with this that the lightning-arrester was defective, furnishing the circuit through the mill by way of the ground up the lightning-arrester to the primary through the defective leads and iron jacket to the secondary and then through the arc formed in the mill to the ground.

See testimony of Fred Utter:

"The porcelain was broken on one of the transformers. One of them had been afire around the transformer and the insulation was somewhat carbonized on the outside. A carbonized insulator might offer a path of conductivity to an electric current under a very high potential. I do not believe that the carbon would cause a short under two thousand volts. I noticed that one of the coils had been afire." (Transcript, p. 39.)

See, also, Transcript, page 86.

A. "I wouldn't hardly think it possible for the heat from the mill to do it. While it might set the pole afire right next to the transformer, I don't think it would set the transformer afire. There was an iron jacket around it, you know. I am not sure whether burned off. I don't believe it did but I believe some braces burned off and the poles fell down. I have assumed that Mr. Jordan saw this transformer burning and have probably taken that into account somewhat in attributing the fire to electrical causes. And supposing Mr. Jordan saw this transformer burning, I should say that the cause of the burn-

ing of the transformer was a breakdown inside of the transformer. I would say that would be the most probable cause and that breakdown would be attributable to a puncture of the insulating material, or of the lead wires which would be the same thing. It would be the inside of the transformer apparatus that the breakdown occurred, and I have taken that into account in assuming the cause of the fire."

See, also, Transcript, page 63.

Q. "I will ask you to take into consideration all of the testimony you have heard in this case, assuming that you have heard it all,—and I think you have,—and tell us if you are able to your own satisfaction to form an opinion as to what caused that fire?"

A. "Yes, sir, I am. An electric arc in the mill is my opinion of that."

Q. "Do you recall the testimony to that effect that the transformer itself was burning on the inside?"

A. "Yes."

Q. "What importance do you attach to that, if any?"

A. "Well, that in my mind would lead me to believe that there was a connection between the primary and the secondary in that transformer and undoubtedly that there was an arc in the transformer and that it was in the same circuit as the other arc was."

We submit there was evidence of a leak through the transformer.

Respectfully submitted,

HENRY C. SMITH,

T. H. MacDONALD,

J. E. ERICKSON,

Attorneys for Defendant in Error.

No. 3382

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

---

NORTHERN IDAHO AND MONTANA POWER COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. L. JORDAN LUMBER COMPANY, a Corporation,

Defendant in Error.

---

# SUPPLEMENTAL AND REPLY BRIEF OF PLAINTIFF IN ERROR.

---

**Upon Writ of Error to the United States District Court of the District of Montana.**

---

B. S. GROSSCUP,
SIDNEY M. LOGAN,
Attorneys for Plaintiff in Error.

LOGAN & CHILD,
Kalispell, Montana,
GROSSCUP & MORROW,
Tacoma, Washington,
Of Counsel.

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

---

#3382.

NORTHERN IDAHO AND MONTANA POWER COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. L. JORDAN LUMBER COMPANY, a Corporation,

Defendant in Error.

**Supplemental and Reply Brief for Plaintiff in Error.**

The findings of the Court were special. They are not marked or designated findings or conclusions, but in every essential they conform to the rules of the District Court and rules laid down in the various federal cases on the subject. For the sake of convenience, we have numbered these findings and here set them forth as follows:

FINDINGS AND CONCLUSIONS OF THE COURT.

1. Within the mill the instrumentalities were plaintiff's, and that a year before the fire they had been condemned by the insurance underwriters and

that they were still in process of uncompleted change at odd times by plaintiff's planerman and men supervised by him.

2. That the fire was caused by the electric current, and based this argument on the suggestion that where electric current is used, there is a probability that the current caused the fire. Then by a process of elimination he excludes other probabilities.

3. The Court finds that the system within the mill was a fire hazard.

4. That without the mill, the instrumentalities were defendant's. That is to say, the high-tension wires, the lightning-arrester and the transformer.

5. That one of the lightning-arresters was in a defective condition which caused it to operate as a continuous ground of the primary wires.

6. That this grounding would tend to induce grounding elsewhere, creating a condition favorable to fire.

7. That plaintiff's defective instrumentalities within the mill might cause fire but that it is more probable that the arrester caused it.

8. That to create a condition favorable to set fire there must be two groundings of the wiring.

9. That the arrester, a continuous ground would probably set fire whenever another ground was by it induced or which happened in the mill.

10. That plaintiff's defective instrumentalities did not set fire until two grounds occurred in the mill.

11. The probabilities are two to one in favor of the theory that the arrester, operating with one ground in the mill as it would, is the cause of the fire.

12. That the mill's defective instrumentalities might have been an agency is not suggested by the defendant, save that plaintiff's failure to ground its conduits is claimed to be contributory negligence.

13. Contributory negligence is not pleaded and does not appear.

In support of this finding the Court argues that plaintiff was not bound to anticipate defendant's negligence, and that plaintiff might be willing to hazard all accidental damage which it might avoid by grounding its conduits, but thereby did not assent to nor assume the risk of damages by defendant's negligence.

14. The arrester defective and causing the fire, the burden is upon the defendant to rebut the negligence arising therefrom.

15. As to whether the arrester was sound when placed in possession or whether due inspection was made does not appear.

16. The Court finds to the effect that the transformer was not in any wise defective.

17. That it was and is in doubt whether it is the better practice to ground the secondary wires or the neutral wire at the transformer so far as fire hazard is concerned. That such grounding tends to increase some hazards but decreases others; but the failure to ground "was not negligence."

The foregoing findings are specific. Every issue raised by the pleadings or suggested by the evidence has been covered by a finding of the ultimate fact in a concise way. The fact that each finding has

been supplemented by argument does not alter the character of the findings as such.

## I.

## AS TO THE TESTIMONY OF PLAINTIFF'S EXPERTS CONCERNING THE RELATION OF THE TRANSFORMER TO THE PROBABLE CAUSE OF THE FIRE.

On page 24 of our original brief we call attention to the testimony of the witness Utter concerning a supposed defect in the transformer and referred to page 38 of the record.

In this connection it is pertinent as well as interesting to note that in the testimony of the two experts, who testified in behalf of defendant in error, reference is made to the supposed defect in the transformer some thirty-six times, and, on cross-examination of the expert witnesses of plaintiff in error, counsel for the mill company refer to the transformer five or six times. These figures are interesting and pertinent for the purpose of showing, when taken in connection with the actual evidence given and the questioning on cross-examination, that the reference to the transformer was not a casual reference nor a hasty or ill-considered statement on the part of the witness, but go to show clearly and without question that the theory of the defendant in error and its witnesses is based entirely upon a supposed defect in that particular piece of equipment.

On page 37, Mr. Utter, referring to the transformer, says:

> "It was not grounded on the secondary at that time. * * * Assuming that the sec-

> ondary was carrying a voltage in the neighborhood of one hundred ten volts, the secondary should have been grounded, and if it were not grounded, and with this lightning-arrester in the condition it was, there would be an additional hazard, from this defective lightning-arrester. The lightning-arrester would offer a high resistance ground,—that is, on the one side of the primary line. The current would naturally take the least course of resistance. *If there was a proper ground there would be no chance for an arc because it would go right to the ground.*" (R. 37, 38.) (Italics ours.)

On page 38, in addition to the language quoted in our former brief, Mr. Utter describes the manner in which there could be a leakage through or around the transformer, and says:

> "It would probably run into some of the wiring and finding a weak spot some place—and create a fire hazard under the conditions of a high resistance ground."

The witness then states that he saw one of the transformers and described its appearance.

We now invite the Court's attention to the hypothetical question based on Mr. Utter's testimony and other evidence in the case. After stating the condition of the weather; the depth of snow on the ground and on the roof of the mill; the fact that the mill was clean; the switch open on the power circuit and closed on the lighting circuit; the fact that there had been no fire in the mill for several hours;

the fact that the buildings were locked, etc.,—counsel for defendant in error says:

> "The secondary on the transformer was not grounded; the lightning-arrester was in the condition in which you have described it. From the primary there was coming a current with a voltage of about twenty-two hundred volts. [The word "thousand" in the transcript being an error.] The interior wiring was in steel conduits and inside the steel conduits there was insulated wire. Also there had been observed immediately previous this condition: That an electric iron attached to the lighting system in question would become red hot in a matter of seconds or probably less than a minute. The lights were burning out. What would you say as to the probable cause of the fire in the mill?" (R. 39, 40.)

On cross-examination, at page 42, in speaking of the surges in the line or the intermittent flow of electricity on account of the lightning-arresters, Mr. Utter says:

> "I don't think it would bother the transformer working as long as there was no other ground on the other side. That leakage in the lightning-arrester might cause an excessive current to pass through the transformer or by it—for instance, part of the secondary might have been out of commission because of the ratio of increase."

On page 43 the witness says:

"The voltage would be increased on the wire between the lightning-arrester and the transformer *by reason of the defective condition of this transformer.* (Italics ours.) I do not mean that the lightning-arrester would have the effect of becoming a transformer and raising the voltage."

On page 50 the witness Stiles testifies that the lightning-arrester would perform its functions "if the secondary was grounded with the neutral wire."

On page 59 the witness Kimmel testifies:

"I should say that this neutral wire ought to be grounded in every case."

And on page 60 says:

"Now, in case of any accidental puncture between your transformer or any connection between them,—between your primary and your secondary wire, it would put two thousand volts on this line,"

And on page 61 he says:

"I meant by that a breakdown in the insulation, between the primary and the secondary or between the primary lead wire in the case, and back again to the lead wire in the secondary."

"Q. Well, I will have to ask you for another explanation. What do you mean by a breakdown?"

"A. A breakdown in the transformer would be a case where the insulation had failed to hold and perform its functions."

On page 62 the same witness in answer to question of plaintiff's counsel describes how a breakdown in the transformer could occur. Whereupon counsel for plaintiff asks the witness Kimmel to state his opinion as to what happened in the transformer, to which the witness replied on page 63;

> "I have a very definite opinion as to what happened there but I don't believe I could tell you why it would happen. I am firmly of the opinion that there was a connection between the primary and the secondary winding."

The hypothetical question was then propounded as follows:

> "Q. I will ask you to take into consideration all of the testimony you have heard in this case, assuming that you have heard it all,—and I think you have,—and tell us if you are able to your own satisfaction to form an opinion as to what caused that fire?"

To which the witness replied, "An electric arc in the mill." Immediately his attention is called by counsel for plaintiff to the testimony that the transformer was burning on the inside and was asked what importance would he attach to that fact, to which he replied:

> "Well, that, in my mind, would lead me to believe that there was a connection between the primary and the secondary in that transformer and undoubtedly that there was an arc in the transformer and that it was in the same circuit as the other arc was."

"Q. How would that set that other fire?"

"A. Wherever that went to ground to complete the circuit."

He then states that he found the current might have gone to ground in the mill. On page 64 the following question is asked of the witness by plaintiff's counsel:

"Q. Taking the description of that mill as you have heard it here, together with the wiring, insulated by means of metal pipe running along the joists and to the various motors and light sockets, etc., how does it come out, and what sets the mill afire?"

To which the witness answers:

"The connection between the primary and secondary with a 2,000-volt circuit would, of course, be scattered throughout that mill. * * * I should say that somewhere between 1,500 and 2,000 volts got into the mill. * * * "

On page 65 the same witness expresses the opinion that the fact that the transformer was afire could be eliminated and still he could form an opinion that the transformer had in fact failed. At bottom of page 66 witness Kimmel says:

"Well, the transformer was described to be afire at the same time that the mill was afire, and in addition to that, there were two simultaneous fires. One in the transformer and one in the mill. That, to my notion, would tend to make me believe that an arc through the one

caused the fire in the other. An arc through the transformer caused the fire in the mill."

And on page 67 he says:

"The grounding of the neutral, if there had been a ground on this transformer, would have made the mill safe."

On page 69 he says:

"When you find the conditions as they have been described to have been in this case, I would expect to find a sustained arc at some point in the plant, wherever the conditions were favorable."

Upon page 71 he says:

"And supposing there was a ground somewhere between the generation plant and the transformer and you haven't a ground like the wet beams in the mill, the current would flow through there to wherever the right point was to set fire to the building. *And if the neutral wire were grounded, I should say that would not happen.*" (Italics ours.)

On page 73 the witness says there was a place on the transformer provided to conform to the underwriters' rule requiring the grounding of the neutral wire. On page 76 the witness says that the breaking of certain pieces of porcelain on the transformers might allow a connection between the case and lessen the resistance between the primary and secondary wires in the transformer. On cross-examination, at page 78, the witness Kimmel says:

"In making up my mind I have been influenced by certain facts which I have assumed to exist, as the basis upon which I made up my mind."

(These facts which Mr. Kimmel assumed to exist will shortly be called to the attention of the Court.)

On page 79, on cross-examination, upon being questioned as to his opinion whether the fire would have occurred under the same conditions if the lightning-arrester had not been installed at all, the following question is asked of the witness Kimmel, and answer given:

"Q. Well, the probabilities of a fire would have been the same, other conditions being the same?

"A. Yes, probabilities would have been there without that ground on the secondary.

"Q. In other words, if the lightning-arrester was there in perfect order, then the other conditions being the same as you have assumed them, the fire would have occurred?

"A. The fact that there was a defective lightning-arrester on there shows me that that wire did actually have a high resistance ground there."

Again, on page 81, the witness Kimmel, referring to the underwriters' rules as to the grounding of the neutral, says:

"I would say in this particular case, a ground on the neutral wire, or if they had that transformer connected up the other way, a ground on either wire would have done the work.

"A good low resistance ground anywhere on the lightning circuit—that is, the secondary between the transformer and the ground would have obviated the danger of an arc incident to a high resistance current."

Again, on page 82, the witness emphasizes from his viewpoint the importance of grounding the secondary. On pages 85, 86 and 87 the witness Kimmel refers to the testimony of the witness Jordan that the latter saw the transformer burning, that he assumed that the cause of the burning of the transformer was a breakdown inside the transformer. He refers to the supposed statement of Mr. McDonald that one coil in the transformer had been rewound. On page 87 he states that he had a conversation with another party, who saw the transformer and whose opinion had influenced the witnesses' opinion as to the cause of the fire. (Here the witness evidently refers to the supposed statement of Carl Miller, whose testimony will be noticed later on.)

On the same page this question is asked Mr. Kimmel:

"In other words, it all reaches out to the question of the transformer being in disorder?"

"A. Supposing you had a contact between the secondary wiring outside of that transformer—the secondary and the primary. There is probably a most favorable case for it to occur, as in the transformer or in the case around the transformer. If the connection between the primary and secondary wiring was outside of the trans-

former then the transformer would not burn. *My idea about it is that this arc did actually boil that oil and boil it over and the oil would catch afire from the heat after it got outside of the transformer.*''

On page 93, on redirect examination, the witness Kimmel said:

''This outside testimony that I spoke of as taking into consideration was what a gentleman by the name of Miller told me. He is one of the defendant's witnesses. I saw him in Kalispell, in Judge Erickson's office. Mr. McDonald, the manager of the Power Company, was not present.''

This conversation with Mr. Miller is referred to on the cross-examination of Mr. Miller, at page 119. There Mr. Miller denies that he ever stated that the transformer was afire. To show the importance which plaintiff attached to the supposed fact that there was a leakage in the transformer from the high tension to the low tension side thereof, the witness Kimmel was called in rebuttal, and at page 145 he says that he was present at a conversation in Judge Erickson's office and heard the witness Miller say that the transformer was on fire. Counsel for plaintiff then asked this question:

''And that is the thing you told the Court you had in mind when you went outside of the hypothetical question this morning?''

''A. That was the exact thing.''

Fred Utter was also called in rebuttal and testified to the conversation with Miller as also did the witness Stiles. On page 95 Fred Utter was recalled and the following question propounded to him.

> "Q. It has been shown in the evidence, Mr. Utter, that one of the coils in the transformer was defective so that it required to be reground. Would that defect in one of the coils in the transformer cause a condition to arise in the secondary which might be a fire hazard, or produce a fire hazard in your opinion?"

To which the witness answered:

> "Yes, it would, I think; * * * The two wires of a circuit in an iron pipe has no bad effect if the current is about normal in each wire. But in the case you state, with a defective coil, which could create a condition where there would be a difference in the voltage of probably several volts in the two wires, if they both run in this pipe, each wire would establish a field of its own and they would naturally have to equalize themselves if they both ran in the pipe."

The witness for defendant testified concerning tests made of the transformers as discussed in our former brief. Our expert witnesses also testified that the transformers were wired and installed according to good practice, also that the alleged defective condition of the lightning-arrester could not have caused the fire, and that there could have been no circuit of the high tension current into or through

the mill without a defective transformer. The importance, however, which the plaintiff attached to the question of the defective transformer is further shown by the questions propounded to the defendant's witnesses on cross-examination. At page 106 defendant's counsel on cross-examination of our witness Mosby asked this question:

> "Now, suppose there had been a defect in the insulation of your primary at this point where it enters the case, and another defect at the point where the secondary leaves the transformer; that is, there might have been a connection between the primary and the secondary through the case, that would not be apparent by an examination of the laminations of the coil?"

And on page 107 the same witness on cross-examination is asked if he heard the testimony of Mr. Stiles and Mr. Utter that the taping was so burned that they could peel it off easily. At page 114 our witness McDonald was cross-examined as to an alleged conversation in which he was supposed to have stated that one coil in one of the transformers was rewound. At page 119 our witness Carl Miller was cross-examined as to his alleged statement that the transformer was burning. On pages 131 to 133, inclusive, our witness Clingerman is cross-examined at length upon the subject of the supposed defective transformers. On pages 141 and 142 our witness Dow is cross-examined on the subject of defective transformers, and on page 142 this question is asked and answered:

"Q. Now, I will get you back to the other proposition: If this fire were caused by a contact between the primary and the secondary in the transformer, or some defect in the transformer, and there had been a neutral grounding on the transformer which had taken care of the condition that was brought about by the defective wiring there getting together, then it wouldn't make any difference what the condition of the conduit system in the mill was, would it?

"A. I cannot say that it would."

Again, on pages 143 and 144, on recross-examination of the witness Dow, counsel for plaintiff emphasizes the importance of the transformer by referring again to the underwriters' rules.

II.

From the foregoing it is clear that in forming their respective opinions as to the cause of the fire, the experts for plaintiff had in mind a defective transformer, and that in formulating a theory upon which a recovery might be had counsel for plaintiff had the same condition in mind. Mr. Utter testifies that he made the examination of the lightning-arresters a short time after the month of December, 1916, which presumably would have been in January, 1917. (R. 36.) The complaint was filed on February 24, 1917, so it must be apparent that the supposed defective condition of the lightning-arrester was known to plaintiff at the time of commencing suit.

It is a matter of some significance that while the complaint charges negligence in the installation of wires, poles, conduits, converter-boxes, transformers,

fuses and plugs, no reference is made to lightning-arresters, and that particular apparatus was brought into the case under the generality, "other necessary electrical apparatus." Conceding for a moment that lightning-arresters are not *necessary* electrical apparatus under the testimony of Mr. Kimmel, to the effect that the fire would have occurred under the same conditions whether the arresters were there or not, the attention of the Court is invited to the following significant language of the complaint:

> "And by reason of said carelessness and negligence such great voltage or load of electricity was carried *to and upon the wires* upon and within the premises of the plaintiff, and by reason of said excessive voltage and *overloading of wires* the premises caught fire," etc.

From this complaint it is impossible to gather the inference that the fire was caused by other than one or both of two acts or omissions amounting to negligence, first, that by reason of a defect in the transformer (the transformer being the known buffer of insulation between the high tension current and the service current delivered to customers), the high tension current escaped from the primary wires and was carried to and within the building *on the secondary wires* connected with the plaintiff's equipment; or, second, that it was the duty of the defendant to install, inspect and keep in repair the interior wires and apparatus of the plaintiff, and that by reason of its failure in this respect a fire occurred with the resultant destruction of the mill. We think that a fair interpretation of the language of the complaint

leads to the conclusion that it was this second cause of action, and none other, that is alleged, and of course it follows, if this be true, that the plaintiffs are not entitled to recovery, for the reason that all of the evidence shows, and the finding of the Court is to the effect, that within the mill the instrumentalities were plaintiff's, and no duty rested upon defendant as to installation, inspection or maintenance; but assuming that the complaint charges actionable negligence upon the part of the defendant, it is clear that that negligence is confined to the act of conducting an excessive load of electricity to and upon the premises in question *upon the wires leading into the mill,* and does not presuppose or suggest a case of negligence in permitting a ground to occur upon the defendant's main transmission line and thence to flow to some point where it was intercepted by the instrumentalities of plaintiff and carried into the mill. In other words, it is impossible to gather from the complaint an allegation or charge that will sustain the theory adopted by the Court. This is not a case where the defendant is estopped from urging a variance or failure of proof in this court; nor is it a case where the Court would be justified in treating the complaint as amended to conform to the proof, for the very palpable reason that there is no proof to warrant the Court's conclusion as to the cause of the fire, and we were not given an opportunity to object to evidence or make an appropriate motion on the ground of variance or failure of proof. If plaintiff is entitled to recover, that recovery must be had on the theory on which it

framed its complaint and introduced its evidence. The Supreme Courts of Montana and the United States have repeatedly held that although the defendant may be negligent, still if the negligence proved is not the negligence alleged, the plaintiff is not entitled to recover.

> Potter vs. Texas & Pac. Ry. Co., 179 U. S. 658, 45 L. Ed. 361, 21 Sup. Ct. Rep. 275, cited with approval in Andree vs. Anaconda Min. Co., 47 Mont. 554.

It hardly seems necessary to cite authorities on a question of practice as fundamental and so well settled as the one involved here, but, inasmuch as the Supreme Court of the United States has very recently been called upon to restate the rule applicable to this question, we take the liberty of quoting from that case.

> "Where any fact is necessary to be proved, in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point, so that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters."
>
> Garrett vs. Louisville & N. R. Co., 235 U. S. 308, 35 Sup. Ct. Rep. 32, 59 L. Ed. 242.

Under the Court's theory it must be apparent that the negligence of the mill company was the proximate cause of the fire, if the fire was electrical, be-

cause under that theory any amount of current flowing from the primary wires through the lightning-arrester would be harmless and would necessarily be dissipated in accordance with the normal purpose of the lightning-arrester, unless some other cause operated to absorb the grounded current and transferred it to the mill. The Court found that this cause was a ground in the mill and, even then the current would be harmless unless a condition existed in the mill favorable to the creation of an arc, because without the arc or heating of the wires adjacent to inflammable material the fire could not have occurred. Hence the negligence of the mill company, first, in permitting to exist in its plant a condition that would complete a circuit from a lightning-arrester functioning normally, and, second, in permitting its service or secondary wiring to become in such a condition or to be carried so close to metallic motors or inflammable material, or in permitting the insulation thereof to become worn or defective so as to constitute a condition where an arc could not be formed in the mill.

There is no support in the evidence, for the conclusion of the Court that the grounding of the primary wires, by means of the lightning-arrester, would tend to induce grounding in the mill. In coming to this conclusion the Court evidently had in mind the testimony of Mr. Kimmel, found on pages 65 and 66, to the effect that when you find one ground on a high tension wire, the tendency of an electric current is always to seek a path to close that circuit up and make a short circuit, that is, to

seek a second ground. Of course the witness said the tendency was to seek a second ground in the same circuit and to close that circuit up. This does not mean, of course, that the tendency is to induce a ground in another and independent circuit or to seek a ground in another or independent circuit. Under the testimony in the case, both on the part of the plaintiff and defendant, it is clear that there is no tendency for a grounded circuit to seek a ground in some other circuit. In fact, as has been shown by the testimony of these experts, that condition never occurs.

Inasmuch as this case begins and ends at the transformer, and in support of the Court's finding as to that particular piece of equipment, we think we may be pardoned for going outside the record for a moment in order to call the attention of the Court to the general character and efficiency of transformers in general.

In a paper read before the American Institute of Electrical Engineers at Pittsfield, Mass., in 1917, Mr. D. W. Roper, electrical engineer for the Commonwealth Edison Company, supplying current to the city of Chicago and its environs, thus introduces the subject of line of service transformers:

> "Within recent years the line transformer has been developed by the manufacturers into one of the most efficient and reliable pieces of electrical apparatus."

The paper in question was the result of a year's observation of the operation of 15,000 line transformers under the supervision of Mr. Roper; during the period mentioned a record was kept. The result of

the record is shown in the accompanying tables. Commenting on this record the authority says:

> "That the transformer is a reliable piece of apparatus is evidenced by the fact that last year the total cost of maintenance and repairs of all transformers on the distributing system with which the author is connected was about 2 per cent of the value of all transformers at present prices. This figure indicates that any suggestions for improvements would be in the nature of refinements in design or construction, and further that if such refinements involve any material increase in the price, they would be justified only for those companies which place a high value on continuous service to their customers."

TABLE I.

Record of Transformer Troubles for the Year 1913.

| Size of transformers. | Cause of Troubles. | | | | | | Total transformer in service Dec. 31, 1913. |
|---|---|---|---|---|---|---|---|
| | Lightning. | Overloads. | Defective. | Grounds and short circuits on secondary wiring. | Miscellaneous and unknown. | Totals. | |
| | Number of cases of trouble. | | | | | | |
| 1 | 4 | — | 2 | — | 2 | 8 | 444 |
| 1.5 | 26 | 2 | 4 | 2 | 12 | 46 | 1,108 |
| 2 | 16 | 2 | 1 | 3 | 6 | 28 | 1,100 |
| 2.5 and 3 | 21 | 3 | 3 | 2 | 3 | 32 | 2,235 |
| 4 | 13 | 2 | 4 | — | 2 | 21 | 1,056 |
| 5 | 9 | — | 4 | 1 | 6 | 20 | 1,951 |
| 7.5 | 23 | — | 2 | — | 11 | 36 | 2,071 |
| 10 | 9 | — | 2 | 1 | 1 | 13 | 1,626 |
| 15 | 2 | 1 | — | — | — | 3 | 1,113 |
| 20 | 1 | — | — | — | — | 1 | 515 |
| 25 | 1 | — | — | — | — | 1 | 350 |
| 30 | 1 | — | — | — | — | 1 | 207 |
| 37.5 and 40 | — | 1 | — | — | 1 | 2 | 139 |
| 50 | 2 | 1 | 1 | — | 1 | 5 | 241 |
| 75 | — | — | — | — | — | 0 | 43 |
| 100 | 1 | — | — | — | 2 | 3 | 54 |
| 150 | — | — | — | — | — | 0 | 3 |
| 200 | — | — | — | — | — | 0 | 16 |
| 250 | — | — | — | — | — | 0 | 2 |
| Totals, | 129 | 12 | 23 | 9 | 47 | 220 | 14,274 |

Total capacity, 129,056 kw.

Approximate total value at present prices, $1,000,000

TABLE II.

Record of the Fuses Blown and Cut-outs Destroyed During the Year 1913.

| | Due to Lightning. | Other Causes | Total. |
|---|---|---|---|
| Fuses blown | 911 | 678 | 1,589 |
| Transformers burned out | 129 | 91 | 220 |
| Total cases of trouble | 1,040 | 769 | 1,809 |
| Cut-outs destroyed | 77 | 332 | 409 |
| Ratio of cut-outs destroyed to total cases of trouble | 7.4 | 43. | 22.5 |

IN DEALING WITH A SUBJECT OF THIS KIND, SPECULATING OR THEORIZING MAY SOMETIMES LEAD TO DISASTROUS AND UNJUST RESULTS.

Our contention is that the transformer must in any event be taken into consideration if negligence is to be fastened upon the defendant. It will be noticed from the foregoing excerpts from the evidence that plaintiff's expert witnesses noted the failure of the power company to ground the neutral wire at the transformer, or, in other words, to ground the secondary system, and one of the witnesses testifies that if the neutral wire had been grounded, the fire could not have occurred.

Now, let us take this theory of plaintiff and try to fit into it the theory eventually adopted by the Court and note the result:

The grounding of the secondary system would have been accomplished by a wire or other low resistance conductor attached to the neutral or one or both of the secondary wires, and extended to some natural or specially prepared ground, so that in the event of a leakage from the high to the low tension side of the transformer, the excess current would be dissipated by the low resistance working ground thus created. Let us assume that such a ground was established. Now, let us examine the theory of the Court in connection with such a situation. The Court found that there was an accidental ground between the transformer and the substation at Kalispell, i. e., the defective lightning-arrester, and assumed that the current passed from the primary

wires to the ground, thence to the mill, thence through an accidental ground into the mill, and that within the mill an arc was formed, adjacent to inflammable material, thus causing the destruction of the plant.

Now, let us suppose that there was no accidental ground within the mill or in connection with the conduits or other appliances under the control of plaintiff; or let us suppose there was an accidental ground, the result would be the same as will be shown.

Now, note the result—the current passes from the high tension or primary wires through the lightning-arrester to ground, it then seeks the second ground and finds it nicely prepared at the transformer poles; it follows the working ground, prescribed by plaintiff's experts, to the secondary wires leading into the mill; thus the transformer is bridged, and as a result the entire two thousand volts are discharged through the secondary wires into the mill, thus creating the condition which the complaint says existed. It follows, then, that if we had done that which plaintiff's experts say we should have done, we would have created a fire hazard, and by omitting to do it we avoided one. It is no answer to this contention that such a condition would be impossible, for the reason, and the very logical and true reason, that the primary current carried into the ground could not enter the mill until it had first found a connection with the primary current, and that by reason of the insulation provided by the transformer, that result would be impossible, because it is the theory of the Court that it was not necessary to complete the high tension circuit.

Now, let us suppose another case in line with the Court's theory and note the result.

> "The lightning-arrester is a piece of electrical apparatus to lead off lightning charges to ground from the system or any other overcharge or excessive voltage and especially lightning." (Testimony of Kimmel R. 53 and 54.)

Now, let us suppose a perfect transformer such as the Court found in place at the mill; let us also suppose that all three of the lightning-arresters were in perfect order and performing their normal functions; also let us suppose a ground in the mill (which is not a very violent supposition in view of the manner in which the mill equipment was installed and maintained). Now, let us suppose a violent thunderstorm or a breakdown in the heavy duty transformers in the Kalispell substation; in that event the primary wires are charged with electricity from the thunderstorm or the breakdown in the heavy duty transformer at the substation, the load of electricity superimposed on the primary wires would probably equal or exceed twenty thousand volts. It would be the duty of the lightning-arresters in that event to carry off the excess voltage, "disrupt the arc and restore the line to its normal condition." (Testimony of Kimmel R. 54). Now, if the theory of the Court that a connection between two systems could be formed through two simultaneous grounds, one in one system and one in the other, with a buffer, insulator or circuit breaker, such as a transformer is supposed to be, separating one system from the other, the excess current would be carried to ground, thence to the mill

and a load approximating twenty thousand volts would be carried into the mill upon the one hundred and ten or the two hundred and twenty volt wires, thus creating a condition which would bring about the total and instantaneous destruction of the mill and its contents. Such a load, of course, carried into the small wires of the mill would cause such a degree of friction as to shrivel the mill appliances, melt the metallic frames and parts of the motors, and generate a degree of heat sufficient, as before suggested, to destroy the mill and equipment almost instantaneously. Again, it is no answer to this suggestion that the transformer—if in perfect working order—would prevent this condition by reason of its insulating qualities. Thus electricity as a commercial or industrial factor would be put out of business, for the reason that human foresight and ingenuity could not guard against disaster where its use is employed. The legal effect of such a theory in its last analysis would be to make public service corporations of this kind insurers and would engraft upon the law of negligence in this respect the doctrine of *res ipsa loquitur*. Both of these doctrines have been repudiated by the courts with practical unanimity in cases of this kind. Such a theory absolutely excludes from consideration negligence on the part of the consuming company whether such negligence contributed to the injury or, in fact, constituted the proximate cause thereof. This can be shown by simple illustration: Thunderstorms are a frequent occurrence. A man installing electrical machinery in his place of business is naturally supposed to know this. The likelihood

of an electrical current from the clouds following copper wires of low resistance to lightning-arresters presumably is within the knowledge of ordinary men. Now, to say that a man, knowing these things, may carelessly install electrical apparatus in a mill, in comparatively close proximity to a high tension line equipped with lightning-arresters, and thereby inviting disaster, is to be excused or exonerated, is certainly new and novel doctrine.

Now, let us suppose another case in line with the Court's theory: The lightning-arresters are, so far as the record in this case shows, approved and up-to-date appliances in general use for the purpose of dissipating lightning charges. Now, let us suppose that adjacent to a high tension power line equipped with lightning-arresters, and that in comparative proximity to such lightning-arresters a small industrial plant should be established, this plant generating its own electricity for lighting and power purposes by means of steam, gas, water-power or otherwise, with the ordinary equipment such as wires, sockets, metal conduits, etc., the system being grounded as a protection to life or property or both. A stroke of lightning loads the high tension wires referred to with a heavy charge of electricity, say twenty thousand volts, and the excess current is grounded by means of the lightning-arresters. Now, if the Court's theory is correct, the current thus grounded would be carried into the industrial plant mentioned, form a connection with the electrical system there and destroy the plant. The injury would be caused by the precaution which the power company had taken to insure the

safety of the lives and property of its customers and by the co-ordinating precaution, taken by the industrial company to ground its system within its plant. It is no answer to this contention that such a supposition is impossible because here are two entirely separate and distinct generating systems, because under the Court's theory that makes no difference. There is no essential difference between the case above supposed and that supposed by the Court.

The whole range of electrical industry and activity would be affected if the conclusion of the Court had a legal or scientific basis: Parallel and intersecting light, power and transportation lines would be impossible, for the reason that intentional grounds are part and parcel of the scheme of electrical distribution and application and accidental grounds are practically unavoidable.

The primary system, assuming a perfect transformer, is as distinct from the secondary system as two separate and distinct generating plants. This will be shown by an illustration showing the difference between electric current transformed by transformer and a current of water—flowing through pipes of different sizes, for instance, a water-pipe of say two inches in diameter, conveys a stream of water by gravity to a certain point and one or more smaller pipes are connected and the water carried off and distributed. The water in the smaller pipe, of course, is the same water conveyed in the large pipe, subject to the same head and influenced by the same pressure; its form, character and identity has in no wise been changed. But an electric transformer is exactly

what its name implies. A current of electricity of high tension is carried into one side; this current sets up a magnetic flux or motion in the iron core of the transformer and the current thus generated is carried out from the opposite side of the transformer by means of the secondary wiring, the voltage of which is determined by the ratio of the coils in the respective sides of the transformer, the ratio being usually ten to one. Assuming a perfect transformer, there is no flow whatever of the primary current to the secondary wires. The transformed has generated, as before suggested, in the iron core of the transformer a new and entirely independent current. As suggested, in our original brief, the case of a steam boiler would be analogous; Heat is generated in the fire-box of the boiler by means of fuel; this heat acting on the shell and tubes of the boiler causes water to boil and form steam; while there is no actual contact between the flames and the water or steam. Now, if there had been, in the case supposed by the Court, an actual contact between the primary and secondary circuits, the Court's hypothesis would have been correct, because in that event the current passing from the supposed defective lightning-arresters to ground, thence to and through the mill, back to the transformer and through the transformer, would have completed the circuit, but in view of the evidence absolutely uncontradicted and, in view of the findings of the Court, these transformers stood there an absolute insulation against the high tension current and an effective circuit-breaker which prevented the excess current coming through the mill, and getting back into the high

tension line. Until that connection is made, all that volume of electricity supposed to have passed through the lightning-arresters is merely a potential, "idle as a painted ship upon a painted ocean"; a bird could have roosted safely on the wires; a man could have held the wires with both hands and the shock he would have received would have been the one hundred ten volts of the lighting circuit only. Electricity in itself is not a source of power; like the belt in a mill or a rigid or flexible shaft, it merely conveys the power produced by a water-wheel or a steam engine. Placed upon the wires of a transmission system, it is idle, harmless and impotent, until in some manner the circuit is completed. So from whatever angle we view the findings of the Court or the evidence in the case, we are led inevitably to the transformer, and no theory predicated upon the negligence of the defendant becomes available until we discover and disclose within or around the transformer some means by which the current passed from the high tension to the low tension side thereof. That passage might have been by means of a puncture within the transformer, or it might have been by means of the too close contact of the secondary and primary wires, or by means of defective insulation at the terminals of the respective systems. But no such conditions have been shown. In fact, it is impossible to gather from the evidence even a suggestion that these transformers or any of them were defective. The man, Carl Miller, whose testimony plaintiff sought to impeach, was not an expert, and his bare statement that the transformers were burning, if he made the statement, which he de-

nies, would carry no weight whatever, and the suggestion of the expert of plaintiff that the defective lightning-arrester might cause deterioration in the insulation and windings of the transformer is too speculative to be worthy of serious consideration, especially when we take into consideration the known stability and dependability of transformers in general.

We have suggested that plaintiff's case shows contributory negligence, and also that whether the negligent acts or omissions of the plaintiff constitute contributory negligence or not, they do offer the basis of a hypothesis, going to show that if the fire was electrical at all, it was caused solely through the mill company's negligence without any contribution to the result by defendant. It will be remembered that one of plaintiff's witnesses testified that the defective lightning-arrester would cause "surges on the line," and the flow of electricity over the line would be intermittent. The power company apparently had no means of detecting these irregularities, and, if they occurred in fact, the effect must have been noticed on the instrumentalities used by and under the control of the plaintiff, and we do not find the plaintiff at any time calling attention of the power company to any defects or irregularities in the service, altho it seems from the testimony of Mr. Jordan, manager of the mill company, that the service had been unsatisfactory for a year before the fire. Here was a business, being carried on, of considerable importance. Lumber or lumber products were being manufactured; the plant presumably was

running night and day, yet for a year before the fire the lights would get dim when the motors were turned on and would brighten up when the motors were disconnected. On page 29 of the record, Mr. Jordan testifies:

> "I first noticed that the lights would get dim when the motors were in service about a year before the fire, about the time the bank of the transformers was put in. I could not give the exact date. And that was continuous every time I shut off the motors and left the lights burning,—they would brighten up; every time I coupled up the motors the lights would get dim."

It is to be noted here that the witness fixes the time that he noticed the irregularity as about the time the transformers were installed, thus evidencing an attempt to connect the particular irregularity with the installation of the transformers; but he never made any serious effort to remedy the defective service, altho the flat-iron in use would get red hot and other irregularities were noticed. (See Record, page 25.) Of course, these irregularities are explained by both the defendant's and plaintiff's expert witnesses as being unimportant, and ordinarily would be anticipated in a plant of this kind. But the fact remains that Mr. Jordan attached considable importance to them at the time of the trial. Mr. Jordan also testifies that the motors were installed by the plaintiff. These motors were moved around from time to time by the plaintiff and his employees (R. 27). The original wires were ordered out by

the underwriters, and Mr. Jordan and his man, Stiles, installed another system in there (R. 27). He bought some material from the merchandise department of the defendant company, also material from Marshall-Wells & Company, of Spokane. On one occasion the underwriters required him to drop a certain cord and use another of heavier insulation. Now, who is to say that the equipment and material used by the mill company was proper equipment for a plant of that kind, and who is to say that it was properly installed? If a railway company should employ an incompetent person to operate a locomotive and by reason of the ignorance of such person an accident should occur, negligence would be predicated upon the employment of an incompetent engineer. Now, Mr. Jordan employed a "*planer-man*" to install this electrical apparatus, to maintain it and keep it in condition. Mr. Stiles confesses that he is not an electrician, so does Mr. Jordan. If we are bound to assume that the fire was electrical and must therefore find a hypothesis to account for it, we find it in the conduct of the plaintiff company through all the years that this mill was in operation. Apparently the mill company never called in an expert to examine or test or inspect its interior equipment. It may have used on the two hundred and twenty volt circuit wire intended for the one hundred and ten volt—in other words, a wire so small that it would not carry the motor loads without great friction and consequent heat. In moving the motors back and forth, the conduits may have been broken, the insulation rubbed therefrom and the conduits or

wires brought in contact with the iron frames of the motors. Mr. Jordan says that the mill had been running continuously without a shutdown for years. Under high working pressure things must have gone wrong at times with the motive power in the mill; hasty repairs must have been made at times in order that the crew of men might not be standing idle; fuses must have blown out, and probably there were times when new fuse plugs were not available for immediate use. What is more natural to suppose than that some genius who knew more about sawlogs than electricity would bridge the terminals in a fuse plug with a nonfusable wire or a nickle coin or some other means to complete the circuit so that the operation of the mill might be resumed? Such a makeshift would destroy the purpose of the fuse plug, and the nonfusing connection between the terminals would carry the current, even though a short circuit should be formed or a grounding occur, whereas, with the plugs in proper order, the fusable material between the terminals, under such conditions, would blow out and destroy the circuit, thus avoiding the fire hazard. It is a matter of common knowledge that incandescent lights radiate considerable heat. It is also a matter of common knowledge that extension cords are used to a very great extent in residences and in industrial plants. It is reasonable to suppose that in this plant one or more such cords were used. In such event, fire could have originated by reason of the lamp being hung on a wooden wall or adjacent to inflammable material by some thoughtless workman, or the lamp could have been moved about and hung on nails and

hooks until the insulation became worn, thereby creating a condition where a short circuit and arc would occur. We suggest these things in order to show that "all other reasonable probabilities" are not by any means excluded.

It is not unreasonable to suppose that in a mill handling all kinds of lumber, boards and dimension stuff would be thrown about sometimes carelessly and, coming in contact with the wires or other electrical equipment, would cause a displacement of the same or a rupture of the insulating material, thereby creating a fire hazard. Any of these suppositions are just as logical and just as easily deduced from the evidence as the supposition that the fire was caused by negligence on the part of the defendant.

In this connection we desire to invite the Court's attention to a very pertinent fact: The complaint charges, as hereinbefore suggested, the use of certain defective equipment. Among this equipment, lightning-arresters are not mentioned. The lightning-arresters were examined in January; the suit was commenced in February; the plaintiff had the benefit of the expert advice of Mr. Utter as to the cause of the fire, yet the lightning-arresters are not mentioned until just before the trial we are notified by the plaintiff to produce our lightning-arresters in court. The transformers, as suggested by the District Judge and in our former brief, were at all times open to the inspection of plaintiff and its expert witnesses; they were lying upon the ground on the premises of the defendant at the time the test of the

lightning-arresters was made. To examine the lightning-arresters, plaintiff's expert had to commit a technical trespass in order to take them off the poles, and momentarily took from the power line a certain protection placed there by the power company. On the other hand, the transformers were lying upon the ground upon plaintiff's premises, entirely disconnected with defendant's power system. An examination could have been made of them without even the commission of a technical trespass. Plaintiff's experts knew that no matter what the condition of the lightning-arresters, a defect in the transformers must be established before a liability could be fixed on defendant, but, as the Court says, they passed these transformers by and took down and inspected and tested the lightning-arresters. It was within the power of the plaintiff to bring to this Court conclusive and convincing proof of defendant's negligence, if negligence there was, by testing out the transformers and demonstrating that there was a leakage from the high tension to the low tension side, if such were the case. Of course had they done this and found the transformers in perfect order, the proposed lawsuit would have to be abandoned and the claim against the power company would vanish. Apparently rather than to take the chance of such a demonstration and such a result, they preferred to let the matter of the defect in the transformer be established by innuendo speculation, and theorizing on the probable effect of the intermittent action of the lightning-arrester on the transformers themselves. In this connection we desire to call the at-

tention of the Court to the well-established presumption in such case, which has been made a part of the statutory law of Montana:

> "The jury subject to the control of the court in the cases specified in this Code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions: * * *
>
> "6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and therefore;
>
> "7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered would be viewed with distrust." Section 8028, Montana Code of Civil Procedure.

DOES NEGLIGENCE ON THE PART OF THE MILL COMPANY APPEAR FROM PLAINTIFF'S CASE?

The charge of the complaint (R. 2–5) is that the defendant "negligently and unskillfully wired said premises" (par. 5, p. 4). The only premises referred to in the complaint are the premises of the plaintiff company, described as its mill and place of business (par. 4 of the Complaint, at p. 3). The complaint in par. 5 further alleges that defendant "carelessly and negligently failed to keep and maintain the same in good repair and carelessly and negligently per-

mitted the said electrical apparatus and fixtures to become worn, damaged and defective, all of which was well known to the defendant, its agents and employees." This clause refers to the unskillfully wired premises and the electrical apparatus and appurtenances installed therein. Then the complaint alleges that "by reason of said carelessness and negligence, such great voltage or load of electricity was carried to and upon the wires upon and within the premises of plaintiff," and that by reason of such excessive voltage the premises were consumed by fire. Now, there is nothing in this charge which relates to any electrical appliances or appurtenances other than those upon the premises of the plaintiff company, and nowhere in the complaint is there any suggestion of any other appliances or appurtenances excepting in paragraph 4, where poles, wires, conduits, converter boxes, transformers, etc., are mentioned, and they are only mentioned in connection with the duty of the defendant company to keep the same in repair, and nowhere is it alleged that any of these instrumentalities not on the premises of defendant became or were defective. Now, the complaint potentially sets up not only contributory negligence on the part of the plaintiff, but it sets up facts which in the contingency, hereafter to be noted, fastens upon the plaintiff the negligence as an independent fact—in other words, it states facts to the effect that the person responsible for the wiring within the mill was guilty of an act or omission which proximately caused the fire. If the plaintiff had furnished proof that the defendant was re-

sponsible for the condition of the instrumentalities within the mill and that those instrumentalities in their condition constituted a fire hazard, the alleged negligence would have been established; but the evidence showed and the Court found that the instrumentalities within the mill were plaintiff's, and that they constituted a fire hazard, the development of the proof and the finding of the Court in effect amended the complaint, and converted the potential allegation of contributory negligence into a positive assertion that the fire was caused by the negligence of the mill company. Therefore, contributory negligence or direct causal negligence on the part of the mill company appears from the complaint.

## HOW DOES NEGLIGENCE ON THE PART OF PLAINTIFF OTHERWISE APPEAR FROM PLAINTIFF'S CASE?

The plaintiff placed upon the stand one Charles H. Stiles, a planerman, and on examination in chief he testified that he was employed by the Jordan Lumber Company, and says:

> "My duties are to keep all the machinery up in shape and look after the tools, and the last two years it was my duty to look after all the lighting and power system and make all repairs."

He also testified in chief concerning the installation of fuses, fuse-blocks, wires, sockets, drop-cords, conduits and connections with the motors in the mill, as did also the witness A. L. Jordan, manager for the plaintiff company. Now, when we take the above-

quoted testimony of Stiles, voluntarily given on direct examination in response to plaintiff's questioning, and substitute it in substance for the allegations in the complaint as to the defendant's duty in that connection, we have a specific allegation that the fire was caused, first, by the defective instrumentalities within the mill, and, second, by the failure of the mill company to properly install, inspect and keep them in repair, so that the contributory negligence or causal negligence on the part of the mill company appears both from the pleading and evidence, and comes squarely within the rules laid down by the Supreme Court of Montana and the courts of the country generally, in which it is held that, if contributory negligence appears from plaintiff's case, the plaintiff is not entitled to recover, even though such negligence be not set up as a defense.

## POINTS AND AUTHORITIES IN REPLY TO BRIEF OF DEFENDANT IN ERROR.

Counsel for defendant in their brief submit four propositions to the Court:

1. That the alleged errors of the trial court are not properly before this court for review.

2. They invoke the doctrine that the appellate court will not reverse the judgment if the evidence is conflicting.

3. That the judgment is based on substantial evidence and that the evidence shows that the transformer did in fact leak.

4. That there is no showing of contributory negligence.

We think that the first contention is set at rest by the decision of this court in the case of San Fernando Copper Min. Co. v. Humphrey, 64 C. C. A. (9th Circuit) 544, and King v. Smith, 49 C. C. A. (9th Circuit) 46.

We also cite the case of Chicago etc. Ry. Co. v. Minneapolis & St. Paul etc. Ry. Co., 100 C. C. A. 41, and Chicago R. I. & P. Ry. Co. v. Barrett, 111 C. C. A. (6th Circuit), 158.

The second contention is not pertinent here. We claim that there is no conflict in the evidence; that the testimony offered both by plaintiff and defendant without conflict or qualification is to the effect that there must have been a leakage in the transformer before a fire hazard, attributable to the negligence of the power company, would be created. The Court made special findings of fact, and these findings covered every issue in the case, and concerning the issue as to the leakage in the transformer the Court found for the power company.

The third ground is that the judgment is based on substantial evidence, and in support of this counsel argue against the finding of the Court as to the condition of the transformers, and appeals to the speculation and theorizing of the mill company's witnesses as to what might have caused a leak in the transformer.

As to the fourth contention, that is, the discussion as to the showing of contributory negligence, we think we have fully discussed that question and shown wherein contributory negligence is shown by plaintiff's case.

In their brief and on oral argument, counsel for defendant in error attacked the findings of the Court to the effect that the transformer was not defective, and argue that the evidence shows that the apparatus did in fact leak.

In support of this contention counsel read from the testimony of Mr. Kimmel as given on pages 64 and 65 of the transcript. The most casual examination of the testimony, however, as quoted by counsel, will demonstrate that the witness had in mind at all times a supposed defective transformer. At page 64 the first sentence discloses this fact:

> "The connection between the primary and secondary with a 2000 volt circuit would, of course, be scattered throughout that mill."

It is clear that the witness was expressing an opinion based on the hypothesis that the transformer had leaked.

On page 65 counsel read from the record as follows:

> "Can you eliminate the fact that the transformer was afire and still form an intelligent opinion about this fire, or not?"

In answer to this question the witness said that it was not necessary for the transformer to be actually afire, but that the fact that it was afire strengthened his opinion, and he thought that the leakage actually occurred. This is shown by his answer to the next question found at bottom of page 66:

> "Well, the transformer was described to be afire at the same time that the mill was afire, and

in addition to that, there were two simultaneous fires: One in the transformer and one in the mill. That, to my notion, would tend to make me believe that an arc thru the one caused the fire in the other. An arc thru the transformer caused the fire in the mill.''

Respectfully submitted,

B. S. GROSSCUP,

SIDNEY M. LOGAN,

Attorneys for Plaintiff in Error.

No. 3382

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

NORTHERN IDAHO AND MONTANA POWER COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. L. JORDAN LUMBER COMPANY, a Corporation,

Defendant in Error.

# PETITION FOR REHEARING.

**Upon Writ of Error to the United States District Court of the District of Montana.**

SIDNEY M. LOGAN,
B. S. GROSSCUP,
Attorneys for Petitioner
and Plaintiff in Error.

GROSSCUP & MORROW,
Tacoma, Washington.

LOGAN & CHILD,
Kalispell, Montana,
Of Counsel.

*United States Circuit Court of Appeals for the Ninth Circuit.*

NORTHERN IDAHO AND MONTANA POWER COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. L. JORDAN LUMBER COMPANY, a Corporation,

Defendant in Error.

**Petition for Rehearing.**

To the Above-named Court and Hon. WILLIAM B. GILBERT, Hon. ERSKINE M. ROSS and Hon. WILLIAM H. HUNT, Judges Thereof:

Comes now the above-named plaintiff in error and petitions the Court to vacate the decision rendered on the 2d day of February, 1920, and to grant a rehearing herein; and in that behalf respectfully represents:

That under the undisputed facts upon the merits of the cause as disclosed by the record, great injustice will be done to your petitioner and it will be subject to a liability not warranted by the facts or the merits of the case unless a rehearing is granted herein and your petitioner is afforded an opportunity to urge the grounds for reversal hereinafter set forth, which grounds of error we submit are controlling as to the question of the jurisdiction of the trial Court to render the judgment herein complained of.

The grounds upon which your petitioner asks a rehearing herein are as follows:

First—The complaint upon which the judgment herein was rendered does not state facts sufficient to constitute a cause of action; is insufficient to sustain such judgment; and is fatally defective in the particulars hereinafter set forth.

Second—The trial Court had no jurisdiction to render the judgment herein complained of by reason of the fact that the complaint in this cause was and is fatally defective in the particulars hereinafter set forth.

Third—That the questions now to be presented and to be urged on rehearing have been settled favorably to the contentions of your petitioner by controlling decisions of the Federal and State courts of last resort.

THE COMPLAINT (R., pp. 2, 3, 4, 12, 13, 14).

We invite the attention of the Court to a consideration of paragraphs 3, 4 and 5 of the complaint, found on pages 2, 3 and 4 of the record and to the amendments to paragraph 3, found on pages 12, 13 and 14 of the record. These amendments by stipulation were treated as having been incorporated in the complaint, and relate to paragraph 3 and are designated as paragraph "3a." These amendments describe in some detail the character of plaintiff's business and the buildings used therein and are important only as they make clear the meaning of the term "premises" as used in paragraph 5 of the complaint.

Our contention is that the complaint is fatally defective in that

1st: It fails to charge that any duty was imposed on the Power Company by contract or by reason of any law of the State of Montana.

2d: That there is no relation between the duty charged in the complaint and the breach charged therein.

3d: That there is no allegation setting forth in ordinary or concise language the facts constituting negligence on the part of the Power Company.

4th: That there is no allegation setting forth the charge that the Power Company had knowledge of the alleged defective condition of its appliances and equipment.

5th: That there is no allegation or statement of fact to the effect that the alleged defective condition had existed for a period long enough to charge the Power Company with presumptive or actual knowledge thereof.

6th: That while the complaint alleges in general terms the duty of the Power Company to have and maintain a safe plant, etc., it wholly fails to charge that there was any duty on its part to wire, repair, install or inspect the electrical apparatus upon plaintiff's premises.

7th. That while the complaint charges that it was the duty of the Power Company to maintain safe plant, machinery, etc., "for the proper and safe generation, transmission and distribution of electricity and to inspect and examine the same," there is no allegation that it was negligent in this respect.

8th: That while the complaint charges that the Power Company "carelessly, negligently and unskill-

fully wired said premises'' (meaning, of necessity, the Mill Company's premises), it wholly fails to charge any duty in that respect.

9th: That the complaint wholly fails to allege or charge how or in what manner any of the apparatus or fixtures mentioned therein became worn, damaged or defective or that the Power Company had knowledge or means of knowledge of such defects at any time prior to the fire.

10th: The complaint shows on *on* its face that at all the times mentioned in the complaint the Mill Company was the owner of and had possession and control of the premises and was in the occupancy thereof carrying on and conducting a business as shown in the amendments on pages 12, 13 and 14 of the record, and had presumptive knowledge of the condition of all equipment and machinery therein and said complaint shows upon its face that the fire, if electrical, was caused by reason of the negligence of the Mill Company and said complaint on its face negatives any liability on the part of the Power Company. The complaint wholly fails to show or set forth any causal connection between any act on the part of the Power Company and the fire in question, and wholly fails to set forth or charge in any manner any neglect of duty on the part of the Power Company or any negligent act or omission on its part.

11th: The allegation as to negligence consists of a series of legal conclusions and no facts are set forth.

Paragraph 3 of the complaint charges: That the Power Company was and now is ''engaged in the business of generating, producing and distributing

electricity and selling and applying the same for lighting power and other purposes to the general public for profit and said company at all times hereinafter mentioned, owned, controlled and maintained in the county of Flathead, Montana, an electric plant for generating and distributing electricity to its patrons, customers and others with whom it had contractual relations."

There is nothing in this paragraph which charges any duty on the part of the Power Company. It merely describes the company as a public service company, furnishing power to persons with whom "it had contractual relations."

Paragraph "3a" as found on pages 12 and 13 declares that on the 25th of December, 1916, the plaintiff owned and operated a planing-mill at Columbia Falls with which it manufactured certain lumber products, and that it had on hand a stock of lumber, tools, machinery, equipment, etc.

Paragraph 4 charges that on the 25th day of December, 1916, for a valuable consideration the Power Company was supplying the plaintiff at its mill electricity for lighting and power purposes, and then charges in general terms the ordinary duties of a power company without any relation to any special contract as to wiring premises or special service of any kind.

Paragraph 5 charges that the Power Company did not discharge its duty as set forth in paragraph 4. This part of the allegation of paragraph 5 is without effect, of course, under the authorities hereinafter cited, in view of the fact that it is a general allega-

tion controlled and qualified by the specific allegation immediately following to the effect that the Power Company "carelessly, negligently and unskillfully wired said premises" (meaning, as before suggested, the premises of the Mill Company).

As before suggested, there is no allegation of duty to wire the premises nor is there any allegation of any contract under which it can be said the Power Company undertook to maintain any supervision or inspection of the wiring within the premises. (Minneapolis Gen. El. Co. v. Cronon, 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A., N. S., 816.)

This paragraph also alleges that the Power Company carelessly and negligently permitted the said electrical apparatus and fixtures to become worn, damaged and defective (meaning, of course, the apparatus and fixtures within the mill building). This is followed by a general allegation that "by reason of said carelessness and negligence, such great voltage or load of electricity was carried to and upon the wires upon and within the premises of the plaintiff."

This allegation, if it means anything at all, is an attempt to allege that by reason of the fixtures within the mill having become worn and defective, the mill caught fire, and of course, in the absence of an allegation setting forth the duty of the Power Company to install such fixtures and to maintain and inspect them, no actionable negligence is alleged. (Minneapolis General El. Co. v. Cronon, 92 C. C. A. 345, *supra.*)

Not only is the complaint silent as to the existence of any special contract concerning the wiring, but is silent as to when the Power Company did the wiring. In neither respect is the complaint aided by the evidence in the case. The record shows (p. 27) that the Power Company installed the equipment in 1910 or 1911 (five to fourteen years prior to the fire); that since that time the premises have been in the possession and under the control of the Mill Company, not only that, but the record further shows on said page, that the motors had been moved around from place to place since the Power Company first installed the wiring by the Mill Company and its employees and that for three years preceding the trial of the case, the Mill Company had its own electrician.

The record further shows on same page that the original wires introduced into the plant by the Power Company had been taken out and the Mill Company had its own man, Mr. Styles, install another system. The record shows on the same page that motors and lamps were bought from the Power Company but that other material was bought from Marshall-Wells at Spokane and others. We cite the record first for the purpose of showing that, according to the complaint, the negligence charged therein was not the proximate cause of the fire for the reason that the installation, charged as the proximate cause of the fire, was removed long before the fire occurred, and in lieu thereof, there was substituted other equipment by and under the direction of the Mill Company, with which the Power Company had nothing whatever to do, and, second, for the purpose of show-

ing that this does not present a case where the complaint is aided by the record in any way nor one where substantial justice calls for the application of any of those rules under which complaints have been sustained, although defective, when attacked for the first time on appeal.

In this state of the record the language of the Circuit Court of Appeals, Eighth Circuit, in the case of Minneapolis Gen. El. Co. v. Cronon, *supra,* is pertinent. In that case the *Power Company had wired the building in question some three years prior to the accident.* Discussing the plaintiff's contention that it was the duty of the Power Company to inspect the Court says:

> "No considerate authority supports this proposition. Its recognition and enforcement by the Courts would impose upon the company furnishing electricity under contract with the owner of a building, who had wired it and owned and controlled the wires inside, an intolerable burden. Take such a city as Minneapolis, with perhaps 20,000 dwelling and business houses wired inside, under an independent contract. The contract of the electrical company is to furnish the required amount of electricity to light these buildings. Can the company, unbidden, enter at will the private house of the citizen and pass into its various rooms to inspect these wires every day to see that they are in proper condition for the reception of the electricity it has contracted to sell? If so, it must employ a large retinue of competent men to do this work; and,

> as absolute insurers under the rule contended for, the necessities of the situation would demand that they should have free access to these buildings at all hours and under all conditions. Such a rule of law would tend to put concerns furnishing electricity to private houses out of business."

Not only does the complaint fail to set out a contract obligating the Power Company to wire the "premises" or to inspect or maintain such wiring after its installation, but the record shows conclusively that it was impossible for such contract to have existed between plaintiff in error and defendant in error for the reason that the A. L. Jordan Lumber Company did not own the property at the time the wiring was installed by the Power Company, and the A. L. Jordan Company as a corporation did not exist at that time.

> "The A. L. Jordan Company began to do business in 1912. Prior to that time the business was transacted in the name of Jordan & Jessup, a copartnership. My interest in that concern was one-half interest. The Power Company installed the electrical equipment outside of the motors in that mill in 1910 or 1911. I couldn't say when the lighting system was installed. It was done after the mill was in. Since 1910 the motors have been moved around from place to place in that plant, and for the past three years I have had my own electrician or a man to do this electrical work. The motors were moved around by myself and my employees." (R., p. 27.)

On page 20, Mr. Jordan testified that the A. L. Jordan Lumber Company owned the property for about five years before it was burned down. This would exclude the years 1910 and 1911, the period during which the Power Company is supposed to have wired the premises.

If a special contract was entered in to wire these premises or to maintain and inspect them, can the Court say, from an examination of this complaint, what the terms of the contract were; what conditions or obligations were imposed on the Mill Company; how long the contract was to continue or what right the Power Company had to enter upon the premises for the purpose of making examination, inspection or repairs; or what consideration was to be paid for the services?

On the other hand, if the Mill Company is seeking to charge the Power Company as a public service corporation under its general liability regardless of special contract, can the Court say what is referred to by the words, "carelessly and negligently permitted the *said* electrical apparatus and fixtures to become worn, damaged and defective," when no apparatus or fixtures other than those coming under the terms "wired said premises, and carelessly, negligently and unskillfully installed said electrical apparatus and appurtenances" are mentioned in paragraph 5 of the complaint? And by the same token, can the Court say what is meant by the terms "carelessly and negligently failed to keep and maintain *the same* in good repair," if the same does not refer to the apparatus and fixtures mentioned in said section 5? This para-

graph of the complaint is not aided by paragraph 4, for the reason that paragraph 4 is self-contained and merely sets forth the general duty of a Power Company.

In the present state of the record it is apparent that the contract, if contract there were, was made with some person not a party to the suit, and if made with the predecessor of the Mill Company, there is no showing that the same was assigned to the defendant in error, if indeed such a contract under any circumstances would be assignable.

The following authorities hold that a Power Company is not liable for injuries caused by defective interior wiring where there is no special contract to maintain or inspect:

> Herzog v. Municipal Elec. Light Co., 89 App. Div. 369, 85 N. Y. Supp. 712 (affirmed without opinion in 180 N. Y. 518, 72 N. E. 1142); National F. Ins. Co. v. Denver Consol. Elec. Co., 16 Col. App. 86, 63 Pac. 449; Harter v. Colfax Elec. Light & P., 124 Iowa, 500, 100 N. W. 508; Memphis Consol. Gas & Elec. Co. v. Speers, 113 Tenn. 83, 81 S. W. 595; Brunelle v. Lowell Elec. Light Corporation, 188 Mass. 493, 74 N. E. 676.

Permit us also to suggest that while paragraph 4 of the complaint (charging the Power Company with the general duty to have and maintain a safe plant, machinery, etc.), also charges a duty on the part of the Power Company to inspect the same at reasonable times, there is no charge in paragraph 5 (relating to the supposed special duty to the Mill Com-

pany), either as to the duty to inspect or the failure to do so; and permit us also in this connection to suggest that this failure to allege is not aided by either the evidence or the decision, for the reason that there was no proof whatever of any contract, special or otherwise, to wire the buildings or to maintain or inspect the instrumentalities within the buildings, and the decision of the trial Court is to like effect. (R. 147.)

## RULES OF PLEADING AS ESTABLISHED IN MONTANA.

Section 6532 of the Code of Civil Procedure of the State of Montana provides:

> "The complaint must contain:
>
> " * * 2. A statement of the facts constituting the *a* cause of action, in ordinary and concise language."

Section 6539 provides that an objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action are not waived by failure to demur. In this case we take it that the doctrine of *res ipsa loquitur* has no application and that only ordinary care is exacted of a Power Company furnishing electrical power to its customers, taking into consideration the dangerous character of electricity. In other words, we take it that it will not be held that a Power Company, under the circumstances set forth in the complaint, will be deemed an insurer.

The Supreme Court of Montana has repeatedly stated the rules of pleading applicable to cases of this character.

In the case of Chealey v. Purdy, 54 Mont. 789, 171 Pac. 926, that Court says:

> "Whatever may be the nature of the cause of action upon which a plaintiff asks to recover, he must allege in his complaint the presence of all of the elements necessary to make it out."

In the case of Ellinghouse v. Ajax Livestock Co., 50 Mont. 275, 152 Pac. 481, the Supreme Court of Montana says:

> "It is well settled by the decisions of the Court that the sufficiency of a complaint may be questioned for the first time on appeal, and that, if found fatally defective, a judgment rendered thereon for the plaintiff will be reversed. (Foster v. Wilson, 5 Mont. 53, 2 Pac. 310; Tracy v. Harmon, 17 Mont. 465, 43 Pac. 500; Shober v. Blackford, 46 Mont. 194, 127 Pac. 329; Coole v. Helena, L. & Ry. Co., 49 Mont. 443, 143 Pac. 974.)

These cases merely give force to the rule declared by the statute (Rev. Codes, sec. 6539), that a failure to question the sufficiency of a complaint by demurrer in the trial Court does not amount to a waiver of the right to question it thereafter.

At page 283 in the same opinion the Court says:

> "It is elementary, when a plaintiff asks recovery for actionable negligence, his complaint must allege facts showing these three elements;
>
> (1) That the defendant was under a legal duty to protect him from the injury of which he complains;

(2) That the defendant failed to perform this duty; and

(3) That the injury was proximately caused by defendant's delinquency. All of these elements combined constitute the cause of action; and if the complaint fails to disclose, directly or by fair inference from the facts alleged, the presence of all of them, it is insufficient, for it fails to state the facts constituting a cause of action."

See, also,

Glover v. Chicago, etc. Ry. Co., 54 Mont. 446.

In the latter case the Court also says:

"But if the happening of the accident is not necessarily inconsistent with ordinary care, *res ipsa loquitur* cannot apply."

See, also,

Fusselman v. Yellowstone V. L. & I. Co., 53 Mont. 256, 163 Pac. 473; Chenowith v. G. N. Ry. Co., 50 Mont. 481; Waite v. C. E. Shoemaker & Co., 50 Mont. 264; McIntire v. N. P. Ry. Co., —— Mont. ——, 180 Pac. 971; Kelley v. John R. Daily Co., —— Mont. ——, 181 Pac. 326.

We invite the particular attention of the Court to the opinion in the case of Pullen v. City of Butte, 38 Mont. 194, 99 Pac. 290.

In that case the plaintiff alleged:

"That the defendant * * * willfully, negligently, carelessly and wrongfully *caused* the public sidewalk on the west side of Idaho

> Street between Galena and Mercury streets, * * * to be placed in, and willfully, carelessly, wrongfully, knowingly and negligently permitted the same to remain in, an unsafe, dangerous, and defective condition."

The Court, after quoting section 6532 of our Revised Code, requiring a statement of the facts constituting a cause of action in ordinary and concise language says:

> "It is true, in some jurisdictions, it seems to be held sufficient to allege generally that the injury complained of was carelessly and negligently inflicted upon the plaintiff, or that, by reason of the carelessness and negligence of the defendant, the plaintiff was injured; but this mode of statement has never been sanctioned or approved in this state, it is at variance with the plain requirements of the Code, and would give the defendant no notice of the acts claimed to be negligence so that he might come prepared to meet them."

In the case of Philips v. Butte etc. Fair Association, 46 Mont. 338, 127 Pac. 1011, the plaintiff was injured by reason of a defective stairway in a grand stand. It was alleged that the defendant negligently permitted the defects to remain *"for a considerable period of time"* before the day of the injury *"and at the time of said injury, and long prior thereto, defendant knew of the defective condition of the said stairs."* The Supreme Court held that this allegation was not sufficient that the complaint did not state

a cause of action, and discusses the measure of duty which the proprieter of such a place owes to a patron who comes thereto at his invitation and pays for the privilege, and holds that such proprietor is not an insurer of the safety of his patrons, but that he is held to ordinary care only, and holds that *under the rule of ordinary care that the allegation as to knowledge of the defects was not sufficient and that the complaint did not state a cause of action.*

In the case of McEnaney v. City of Butte, 43 Mont. 526, 117 Pac. 893, the plaintiff slipped on an icy sidewalk. The plaintiff alleged "that at and during all the times herein mentioned, the defendant had full knowledge of all the facts and matters herein alleged."

Referring to the question of knowledge on the part of the city as to the defective condition of the sidewalk, the Court say:

> "Was this period of time an hour, or a day or a month? The allegation is but a conclusion which the pleader has left unaided by the statement of any specific fact to enable one to determine what the length of time was. Hence the complaint does not contain a statement of facts in ordinary and concise language (Rev. Codes, para. 6532), and is insufficient to sustain a judgment."

The following rule was laid down by the United States Supreme Court in

> Minor v. Mechanics' Bank, 1 Pet. 46, and reaffirmed in

Garrett v. Louisville & N. R. Co., 235 U. S. 108, 35 Sup. Ct. Rep. 32, 59 L. Ed. 242:

"Where any fact is necessary to be proved, in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point, so that the parties may come prepared with their evidence and not be taken by surprise, and the Jury may not be misled by the introduction of various matters."

See, also,

Alabama v. Burr, 115 U. S. 415.

## QUESTION MAY BE RAISED FOR FIRST TIME ON APPEAL.

The following decisions by the Supreme Court of the United States hold that the question of the sufficiency of the complaint may be raised for the first time in the Appellate Court:

Slacum v. Pomeroy, 6 Cranch, 221; Bennett v. Butterworth, 11 How. 676; Suydam v. Williamson, 20 How. 433; Pomeroy v. Indiana St. Bank, 1 Wall. 600; Rogers v. Burlington, 3 Wall. 661; Thompson v. Central Ohio R. Co., 6 Wall. 137; Kentucky L. etc. Ins. Co. v. Hamilton, 63 Fed. Rep. 93; McAllister v. Kuhn, 96 U. S. 87, 24 L. ed. 615; Cragin v. Lovell, 109 U. S. 194, 27 L. ed. 903; Coffey v. U. S., 116 U. S. 436, 29 L. ed. 684; Garland v. Davis, 4 How. 131, 11 L. ed. 907.

In the case of Slacum v. Pomeroy, *supra,* and Garrett v. Davis, *supra,* the Supreme Court reversed the respective judgments altho the objection was in neither case raised below, and in the latter case was not raised by counsel for plaintiff in error. (Note 58, sec. 711, page 2550, 3 Foster's Federal Practice.)

The following decisions by the Supreme Court of Montana hold that on appeal from a judgment the question of the sufficiency of the complaint may be raised for the first time in the Supreme Court:

> Largey v. Sedman, 3 Mont. 272; Foster v. Williams, 5 Mont. 53, 2 Pac. 310; Parker v. Bond, 5 Mont. 1, 1 Pac. 209; Vance v. McGinley, 39 Mont. 46, 101 Pac. 247; Glendenning v. Slaten, 55 Mont. 586, 179 Pac. 817 (decided April 14, 1919.).

ELECTRIC COMPANY NOT AN INSURER.

To the same effect is the decision of this court in Puget Sound Navigation Co. v. Lavender, 84 C. C. A. 259.

Referring again to the case of Phillips v. Butte Fair Association, 46 Mont. 238, the distinction is made in a general way between one who is charged as an insurer and one who is charged with the exercise of ordinary care.

We submit that under the weight of authority, both state and federal, electric companies may not be charged as insurers and that they are held to the exercise of ordinary care,—this care, of course, to be measured by the character of electricity as a dangerous agency.

(To be inserted at page 19 following the citation of Bourke v. Butte, etc, Power Company)

City Light & Water Co v. James
261 Fed 596 (Nov 12, 1919).

his case distinguishes the case of San Juan Light Company v- Requena, 224 U. S. 89. The Requena case is distinguished from the case at bar at page 32 of our brief in chief.

See Curtis Law of Electricity, section 400, page 583, and section 405, page 595, and authorities cited.

This general rule has been adopted by the Supreme Court of Montana.

Bourke v. Butte etc. Power Co., 33 Mont. 267.

## THE GENERAL CHARGE OF NEGLIGENCE IS CONTROLLED BY THE SPECIFIC CHARGE IN THE COMPLAINT.

We have heretofore suggested that the general allegation contained in paragraph 5 of the complaint, that the Power Company did not discharge its duty as set forth in paragraph 4, is not entitled to be considered, for the reason that this general allegation is controlled and qualified by the specific allegation immediately following, to the effect that the Power Company *"carelessly, negligently and unskillfully wired said premises."* The authorities on this question are collated in the note to Walter v. Seattle, Renton & Southern Ry. Co., 48 Wash. 233, 93 Pac. 419, as reported in 24 L. R. A. (N. S.) at page 788.

The Supreme Court of the State of Montana in the case of Pierce v. G. F. & C. Ry. Co., holds that where even a passenger sets out the specific act of negligence, a recovery cannot be had on a general allegation, nor upon the doctrine of *res ipsa loquitur,* which in Montana concededly applies in the case of a passenger where the passenger relies upon the doctrine and does not attempt to set out the specific negligence upon which he seeks to charge the carrier. In cases of the kind at bar the doctrine of *res ipsa loquitur*

does not apply in any event, and the bare fact that an injury has occurred affords no ground for inferring negligence.

> Lyons v. Chicago, M. & St. P. Ry. Co., 50 Mont. 532, 148 Pac. 386; Nelson v. N. P. Ry. Co., 50 Mont. 516, 148 Pac. 388; Howard v. Flathead Ind. Tel. Co., 49 Mont. 197, 141 Pac. 153.

If we were to apply the doctrine of *res ipsa loquitur* in this case much would depend, as the Supreme Court of the United States said, in a recent case, upon the *"res."* In this case the complaint charges that the Mill Company was the owner of, using, operating and controlling the premises, and, if an electrical fire occurred within the premises, the presumption, if any, would be that it was caused by the negligence of the company which had the electrical instrumentalities and equipment under its control, which, as before suggested, would be in this case the Mill Company. (Minneapolis Gen. El. Co. v. Cronon, 92 C. C. A. 345.

## THE COMPLAINT SHOWS CONTRIBUTORY NEGLIGENCE ON THE PART OF THE MILL COMPANY.

The Mill Company was the owner of, in possession and control of the premises which it says the Power Company negligently wired. This charges the Mill Company with knowledge of the condition of the equipment which it was using, as it says it was in the manufacture of lumber products.

In Montana, contributory negligence is ordinarily a matter of defense, but if the complaint shows con-

tributory negligence, then it is incumbent upon the plaintiff to allege facts sufficient to exonerate it from the charge.

Lynes v. Northern Pacific Ry. Co., 43 Mont. 317, Ann. Cas. 1912C, 183, 117 Pac. 81; Poor v. Madison River Power Co., 38 Mont. 341, 99 Pac. 847; Montague v. Hansen, 38 Mont. 376, 99 Pac. 1063; Michalsky v. Centennial Brewing Co., 48 Mont. 1, 134 Pac. 307.

## THE RECORD.

We take it that a petition for rehearing is addressed to the discretion of the Court, and in order that this discretion may be properly exercised, we deem it proper to refer to the record in this case, not for the purpose of restating or rearguing any legal propositions heretofore submitted, but in order that the effect of a rehearing and a reversal thereon may be determined on the principles laid down in the case of

Garland v. Davis, 4 How. 131, 11 L. ed. 907, *supra.*

Many of the courts have laid down the rule that where the merits of the case justify such course, the complaint will be deemed amended to conform to the evidence when the question of the sufficiency of the complaint is raised for the first time on appeal. Other courts have adopted the rule that in such circumstances, the case will be remanded with instructions directing that the pleading be amended to conform to the proof, and some Courts have been disposed to disregard the objection when made for the

first time on appeal. But as will be noted, by reference to the foregoing authorities, this rule has never been adopted by the Supreme Court of Montana or by the Federal courts of last resort.

The question then is, Are we too late in urging these objections to the complaint? Our contention in this respect is that the question is jurisdictional and therefore may be urged at any time. Secondly, that it is contrary to the policy of the Courts generally to permit a judgment to rest upon a complaint which does not state a cause of action, and, third, that in this case none of the reasons for disregarding the error, or correcting it, which the Courts have given for rulings along that line, are present.

It would be hard, indeed—nay—it would be impossible to amend this complaint to conform to the proof and still leave the record in such shape that a judgment for plaintiff would be warranted. Not only the complaint, but the evidence wholly fails to establish a cause of action against the plaintiff in error, and, if the judgment is permitted to stand, a great hardship will be worked upon the plaintiff in error by reason of its failure to move the lower Court to render judgment in its favor.

We urge that we are justified in asking that the judgment be reversed on the grounds herein suggested, for the reason that thereby substantial justice may be done the parties, and we believe that, under the decision in the Garland-Davis case, we are warranted in presenting this petition. In that case, Mr. Justice Woodbury in his opinion says:

"In the examination of this case, a defect has been discovered in the pleadings and verdict, which was not noticed in the court below, *nor suggested by the counsel here* (italics ours).

And the first question is, whether, under the circumstances, it can be considered by us; and if it can be, and is a material defect, not cured or otherwise capable of being overcome, whether it ought to be made a ground for reversal of judgment, and sending the case back for amendment and further proceedings.

There can be no doubt that exceptions to the opinions given by the Court below must all be taken at the time the opinions are pronounced.

But it is equally clear that when the whole record is before the Court above, as in this case, any exception appearing on it can be taken by counsel which could have been taken below. (Roach v. Hulings, 16 Peters, 319)."

So it is the duty of the Court to give judgment on the whole record *and not merely on the points stated by counsel* (italics ours). (Slacum v. Pomeroy, 6 Cranch, 221; Baird & Co. v. Mattox, 1 Call, 257, 16 Pet. 319.)

In United States v. Bernum (1 Mason, 62) the Court took notice of the defect, which was the sole ground of its opinion. In Patterson v. United States (2 Wheaton, 222) it is stated that "The points made were not considered by the Court, and judgment was pronounced on other grounds," and Justice Washington says (page 24):

> "The Court considered it to be unnecessary to decide the questions which were argued at the bar, as the verdict is so defective that no judgment can be rendered upon it and on that account the proceedings below were reversed. (See, also, Harrinson et al., v. Nixon (Pet. 483, 535."

Again, in the same case, Mr. Justice Woodbury says:

> "Considering the character and position of this tribunal, as one of the last resort in administering justice, and considering the increased disposition of the age in which we live to eviscerate the truth, and decide ultimately only on the real merits in controversy between parties, or in the words of Justice Story (1 Story, 152, in Bottomly v. The United States), as to 'technical niceties,' considering 'the days for such subtilties in a great measure passed away,' it seems a duty of our own motion to give all reasonable facility to get the record in an intelligible and proper shape before we render final judgment."

Whether the result of a rehearing be a reversal of the judgment with instructions to enter judgment in favor of the plaintiff in error or whether it be that the cause be remanded with instructions to permit the complaint to be amended and a new trial granted, it seems to us that such rehearing ought to be granted and the plaintiff in error given an opportunity to urge the objections herein set out in order that it may have the benefit of the principles laid down in the Garland-Davis case, and in order that a judg-

ment not justified by the pleadings or the evidence may be set aside.

No better illustration of the effect of defective pleadings as observed by the Supreme Court of the United States in the cases of Minor v. Mechanics' Bank and Garret v. Louisville, *supra,* can be found than in the case at bar.

The Court below found that the fire was caused by reason of a defective lightning-arrester, located several hundred feet from the premises. The complaint contained no allegation remotely referring to lightning-arresters, altho it mentioned other electrical apparatus, and it charged only negligence in installing electrical "fixtures" and apparatus on plaintiff's premises.

Our main contention, however, is that under no view of the evidence or the complaint was plaintiff entitled to recover, and that this defect appearing of record, it ought now to be corrected to the end that substantial justice may be done.

Respectfully submitted,

B. S. GROSSCUP and
SIDNEY M. LOGAN,

Attorneys for Petitioner and Plaintiff in Error.

State of Montana,
County of Flathead,—ss.

I, Sidney M. Logan, do hereby certify: That I am one of the attorneys for plaintiff in error and petitioner herein; that in my judgment the foregoing petition is well founded; and that it is not interposed for delay.

SIDNEY M. LOGAN,

Of Counsel for Plaintiff in Error and Petitioner.

No. 3383

12

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

---

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

RAINIER BREWING COMPANY, a Corporation,
LOUIS HENRICH and R. SAMET,
Defendants in Error.

---

# Transcript of Record.

---

**Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.**

---



Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3383

# United States
# Circuit Court of Appeals
## For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

RAINIER BREWING COMPANY, a Corporation,
LOUIS HENRICH and R. SAMET,
Defendants in Error.

# Transcript of Record.

**Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.**

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

**Names and Addresses of Attorneys of Record.**

For Plaintiff and Plaintiff in Error:

UNITED STATES ATTORNEY, San Francisco, Cal.

For Defendant and Defendant in Error:

THEODORE A. BELL, Esq., San Francisco, Cal.

---

*In the Southern Division of the United States District Court for the Northern Division of California, First Division.*

No. 7824.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation, et als.,

Defendants.

**Praecipe for Transcript of Record.**

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the writ of error heretofore sued out and perfected to said Court, and include in said transcript the following records, proceedings and papers on file, to wit:

1. Information.
2. Demurrer to information.
3. Order sustaining demurrer to information.

4. Opinion of Court on demurrer.
5. Judgment.
6. Bill of exceptions.
7. Petition for writ of error.
8. Assignment of errors.
9. Order allowing writ of error.
10. Writ of error.
11. Citation.
12. This praecipe.
13. All other records, proceedings and papers in said cause.

Dated this 21st day of August, 1919.

ANNETTE ABBOTT ADAMS,
United States Attorney,
CHARLES W. THOMAS, Jr.,
Asst. United States Attorney, [1*]
Attorneys for Plaintiff and Plaintiff in Error.

[Endorsed]: Due service of the within admitted this 21st day of August, 1919.

THEODORE A. BELL,
Attorney for Defendants and Defendants in Error.

Filed Aug. 22, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [2]

---

*Page-number appearing at foot of page of original certified Transcript of Record.

*In the Southern Division of the United States District Court for the Northern District of California, First Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation, LOUIS HENRICH and R. SAMET,

Defendants.

**Information.**

At the March Term of the said Court in the year of our Lord, One thousand nine hundred and nineteen,—

BE IT REMEMBERED that Annette Abbott Adams, United States Attorney for the Northern District of California, who for the United States, in its behalf, prosecutes in her own person, comes into court on this, the third day of July, 1919, and with leave of Court first had and obtained, gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by special affidavits made under oath, and that this information is based upon said affidavits, which said affidavits are hereto attached and made a part hereof;

Now, therefore, your informant presents that the Rainier Brewing Company is a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, and having its

principal place of business in California, at and in the city and county of San Francisco.

That the Rainier Brewing Company, a corporation, Louis [3] Henrich and R. Samet, did at San Francisco, in the Southern Division of the Northern District of California, on the second day of July, 1919, in violation of the Act of November 21, 1918, wilfully, unlawfully and knowingly sell to one Jerry Sheehan for beverage purposes and not for export ten (10) boxes, each containing two (2) dozen bottles of beer, which beer contained as much as one-half of one per cent of alcohol by both weight and volume, all of which the said defendants then and there well knew.

AGAINST the peace and dignity of the United States of America, and contrary to the form of statute of the said United States of America, in such case made and provided.

ANNETTE ABBOTT ADAMS,
United States Attorney. [4]

United States of America,
Northern District of California,—ss.
City and County of San Francisco.

C. W. Hughes, being first duly sworn, deposes and says:

That the Rainier Brewing Company, a corporation, Louis Henrich, and R. Samet, did, on the 2d day of July, 1919, in the city and county of San Francisco, State of California, sell to one Jerry Sheehan for beverage purposes and not for export, ten boxes, each containing two dozen pint bottles of beer, which beer

contained as much as one-half of one per cent of alcohol by both weight and volume.

C. W. HUGHES.

Subscribed and sworn to before me this 3d day of July, 1919.

[Seal] T. L. BALDWIN,
Deputy Clerk U. S. District Court, Northern District of California. [5]

United States of America,
Northern District of California,—ss.
City and County of San Francisco.

E. M. Blanford, being first duly sworn, deposes and says:

That the Rainier Brewing Company, a corporation, Louis Henrich and R. Samet, did, on the 2d day of July, 1919, in the city and county of San Francisco, State of California, sell to one Jerry Sheehan for beverage purposes and not for export, ten boxes, each containing two dozen pint bottles of beer, which beer contained as much as one-half of one per cent of alcohol by both weight and volume.

E. M. BLANFORD.

Subscribed and sworn to before me this 3d day of July, 1919.

[Seal] T. L. BALDWIN,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed July 3d, 1919. W. B. Maling, Clerk. By T. L. Baldwin, Deputy. [6]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Thursday, the tenth day of July, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM H. SAWTELLE, Judge.

No. 7824.

UNITED STATES OF AMERICA

vs.

RAINIER BREWING CO. etc., LOUIS HENRICH and R. SAMET.

**(Arraignment.)**

This case came on regularly this day for arraignment of defendants, Louis Henrich and R. Samet and Rainier Brewing Co., etc. Defendants, Louis Henrich and R. Samet were present in Court with attorney, Theodore Bell, Esq. Defendant, Rainier Brewing Co., etc., was present by and through attorney Theodore Bell, Esq. On motion of Mrs. A. A. Adams, United States District Attorney, and on order of Court, each of said defendants were duly arraigned upon the Information filed herein, stated their true names to be as contained therein, waived formal reading thereof, and on motion of Mr. Ball, the Court ordered that this case be and the same is hereby continued to July 14, 1919, for entry of defendants' pleas. [7]

*In the Southern Division of the United States District Court for the Northern District of California, First Division.*

(No. 7824.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation, LOUIS HENRICH and R. SAMET,

Defendants.

**Demurrer.**

Now come the defendants above named, and each of them, and demur to the information filed herein, upon the following grounds:

I.

That said information does not state facts sufficient to constitute a public offense under the laws of the United States, or any offense against the United States or its laws.

II.

That said information does not state facts sufficient to constitute a public offense, in that it is not alleges therein, nor does it appear therefrom, that the beer alleged to have been sold by the defendants was of an intoxicating malt or vinous liquor, or an intoxicating liquor.

WHEREFORE said defendants, and each of them, pray to be hence dismissed.

THEODORE A. BELL,
Attorney for Defendants. [8]

[Endorsed]: Due service of within demurrer is hereby admitted this 14th day of July, 1919.

ANNETTE ABBOTT ADAMS,
U. S. Attorney.
FRANK M. GEIS,
Asst. U. S. Attorney.

Filed July 14, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy. [9]

---

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Monday, the twenty-eighth day of July, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM H. SAWTELLE, Judge.

No. 7824.

UNITED STATES OF AMERICA
vs.
RAINIER BREWING CO., etc. et al.

**(Order Sustaining Demurrer.)**

Pursuant to oral opinion this day rendered, the Court ordered that the demurrer to the information heretofore submitted herein be and the same is hereby sustained. On motion of F. M. Silva, Esq., Assistant United States District Attorney, the Court ordered that an exception to said order be and the

same is hereby entered on behalf of the plaintiff. **[10]**

---

*In the Southern Division of the United States District Court for the Northern District of California, First Division.*

Honorable WM. H. SAWTELLE, Judge.

No. 7824.

UNITED STATES OF AMERICA

vs.

RAINIER BREWING COMPANY, a Corporation, LOUIS HENRICH and R. SAMET,

Defendants.

**(Oral Opinion Overruling Demurrer.)**

Monday, July 28th, 1919.

ANNETTE ABBOTT ADAMS, United States Attorney, FRANK M. SILVA, Assistant United States Attorney, for the Government.

THEODORE A. BELL, for the Defendants.

The COURT (Orally).—The information charges that the defendants, in violation of the Act of Congress of November 21st, 1918, sold for beverage purposes, and not for export, beer which contained as much as one-half of one per cent of alcohol by weight and volume. It does not allege that said beer was intoxicating and it is the contention of the prosecution that it is not necessary to so allege. The defendants contend that their demurrer to the information should be sustained because said act of Congress is un-

constitutional and void and because said act does not prohibit the sale of non-intoxicating beer. In the case of the Rainier Brewing Company vs. Adams, United States Attorney, et al., I held [11] the act to be constitutional and refused to enjoin said United States Attorney from instituting prosecutions thereunder, and after a careful consideration and examination of the authorities I am more than ever convinced that the act is constitutional. The act was passed for the purpose of conserving the man-power of the nation and to increase efficiency in the production of arms, munitions, ships, food and clothing for the Army and Navy. In order to accomplish this purpose, namely, of conserving man-power and increasing efficiency, as aforesaid—in other words, to appropriate one hundred per cent efficiency—Congress came to the conclusion that it was necessary that a law should be enacted prohibiting for a limited period the manufacture and sale of intoxicating liquors for beverage purposes. Thereupon Congress enacted "that after June 30th, 1919, and until the conclusion of the present war, and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States * * * it shall be unlawful to sell for beverage purposes any distilled spirits." The act further provides that "during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export."

It is thus clearly shown that Congress had very definitely determined that after June 30th, 1919, and until the termination of demobilization, distilled

spirits should not be sold for beverage purposes. To further aid in carrying out the declared purpose of the Act, namely, "to conserve the man-power of the nation and to increase efficiency," as aforesaid, it was provided in said act that after May 1st, 1919, "and until after the termination of demobilization * * * no grains, cereals, fruit or other food product shall be [12] used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquors for beverage purpose." It was further provided in the act—and it is this provision that defendants herein are charged with having violated—that "after June 30th, 1919, until the conclusion of the present war, and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export." Keeping in view the purpose of the act, Congress added this provision, "After the approval of this Act, no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization." The word "beer" is omitted from this provision and the word "malt" is substituted therefor. I think Congress was not interested in providing against the importation of malt liquors containing, we shall say, one-fourth of one per cent of alcohol, but against the importation of intoxicating liquors. Manifestly, the words "other intoxicating liquors" relate to and qualify the preceding word "malt," so that only intoxicating

malt liquors were within the statute.

After a careful anaylsis of the statute under which this prosecution has been brought, I have concluded that the words "or other intoxicating malt or vinous liquors" qualify the preceding words "beer" and "wine," and that it is not unlawful to sell beer which is not intoxicating. Therefore, to bring beer within the prohibition of the act the information should allege that it was intoxicating. It does not so allege and therefore I sustain the demurrer. [13]

It must not be understood from anything I have said that I have held that it is lawful to sell beer which contains two and three-quarters per cent alcohol by weight or volume, or that it is lawful to sell beer which contains one-half of one per cent alcohol. I have simply held that it is not unlawful to sell beer which is not intoxicating. The Commissioner of Internal Revenue has held that "a beverage containing one-half of one per cent or more of alcohol by volume will be regarded as intoxicating." The Department of Justice is in accord with that holding and is making conscientious efforts to have the Court adopt that view. The case at bar, no doubt, will be appealed to the Supreme Court. Should the Supreme Court adopt the Government's contention and hold that all who have manufactured beer containing as much as one-half of one per cent of alcohol are guilty of violating the act of November 21st, 1918, they may find prison sentences awaiting them, and it might be well for those who are so engaged to pause and consider whether the money to be made is sufficient to justify the risk. A Court might not, under all the circum-

stances, look upon their pleas for leniency with any great degree of compassion.

Mr. SILVA.—May we have an exception to the ruling of the Court on the demurrer?

The COURT.—Yes; the Clerk will note an exception to the ruling of the Court in sustaining the demurrer to the information.

[Endorsed]: Filed Aug. 20, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [14]

---

*In the Southern Division of the United States District Court for the Northern District of California, First Division.*

No. 7824.

THE UNITED STATES OF AMERICA,

vs.

RAINIER BREWING COMPANY, a Corp., LOUIS HENRICH and R. SAMET.

**Judgment.**

In this case the defendants' demurrer to the information having been sustained,

IT IS THEREFORE ORDERED AND ADJUDGED that the information herein as against Rainier Brewing Company, a Corp., Louis Henrich and R. Samet be dismissed and that they go hence without day.

Further ordered that their bonds be and the same are hereby exonerated.

Judgment entered this 28th day of July, A. D. 1919.

WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk. [15]

---

*In the Southern Division of the United States District Court for the Northern District of California, First Division.*

No. 7824.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RAINIER BREWING COMPANY a Corporation, LOUIS HENRICH, and R. SAMET,
Defendants.

**Bill of Exceptions.**

BILL OF EXCEPTIONS ON BEHALF OF UNITED STATES OF AMERICA, PLAINTIFF IN ERROR HEREIN.

Be it remembered, that on the 14th day of July, 1919, at a stated term of said Court, begun and holden in the city and county of San Francisco, State of California, before his Honor, Judge W. H. Sawtelle, District Judge, the issue of law joined in the above-entitled case between the parties upon the information of the plaintiff and the demurrer of defendants thereto, as shown by the judgment-roll and record herein, came on to be heard before said Judge, the parties

aforesaid, by their counsel, having, according to the statute in such cases made and provided, and in accordance with the rules of said Court argued said cause and submitted the respective briefs thereon; and thereafter, on the 28th day of July, 1919, the said Court sustained the demurrer to said information, to which ruling the said plaintiff, United States of America, duly excepted and now assigns the said ruling as error.

Dated the 20th day of August, 1919.

ANNETTE ABBOTT ADAMS,
United States Attorney,
CHARLES W. THOMAS, Jr.,
Assistant United States Attorney,
Attorneys for Plaintiff and Plaintiff in Error.

[16]

NOTICE.

To Rainier Brewing Company, a Corporation, Louis Henrich and R. Samet, Defendants in Error and to Theodore A. Bell, Esquire, Their Attorney:

Gentlemen: You will please take notice that the foregoing constitutes and is the bill of exceptions of the plaintiff, United States of America, in the above-entitled cause, and that the said plaintiff will ask the settlement, allowance and approval of the same.

Dated this 20th day of August, 1919.

ANNETTE ABBOTT ADAMS,
United States Attorney,
CHARLES W. THOMAS, Jr.,
Assistant United States Attorney,
Attorneys for Plaintiff and Plaintiff in Error.

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto and their respective counsel, that the above and foregoing bill of exceptions is true and correct in all particulars and that the same may be settled, allowed and approved by the Court without further notice, and that the same may be made a part of the records in the above-entitled cause.

Dated this 20th day of August, 1919.

ANNETTE ABBOTT ADAMS,
United States Attorney,
CHARLES W. THOMAS, Jr.,
Assistant United States Attorney,
Attorneys for Plaintiff and Plaintiff in Error.
THEODORE A. BELL,
Attorney for Defendants and Defendants in Error.

[17]

---

**Order Settling, Allowing and Approving Bill of Exceptions.**

In the matter of the foregoing bill of exceptions duly presented in time, by plaintiff, United States of America, plaintiff in error herein,

It is hereby ordered by said Court that said bill of exceptions be and the same is hereby settled, allowed and approved as true and correct in all particulars and

IT IS HEREBY FURTHER ORDERED by said Court that said bill of exceptions be and the same is hereby made a part of the records in the above-entitled cause.

Given and dated at San Francisco, California, this 21st day of August, 1919.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Aug. 21, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. **[18]**

---

*In the Southern Division of the United States District Court for the Northern Division of California, First Division.*

No. 7824.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation, LOUIS HENRICH, and R. SAMET,
Defendants.

**Petition for Writ of Error.**

Comes now the United States of America, by Annette Abbott Adams, United States Attorney, and feeling aggrieved by the judgment of this Court made and entered on the 28th day of July, 1919, wherein and whereby the information herein as against defendants, Rainier Brewing Company, a corporation, Louis Henrich and R. Samet, was dismissed and wherein and whereby it was ordered, adjudged and decreed that the said defendants go hence without day and that their said bonds be exonerated, and hereby petitions this Honorable Court for the

allowance of a writ of error herein to the United States Circuit Court of Appeals in and for the Ninth Circuit; and that a full and complete transcript of all records, proceedings and papers in the above-entitled case be transmitted by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated this 21st day of August, 1919.

ANNETTE ABBOTT ADAMS,
United States Attorney,
CHARLES W. THOMAS, Jr.,
Assistant United States Attorney,
Attorneys for Petitioner. [19]

[Endorsed]: Filed Aug. 21, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [20]

---

*In the Southern Division of the United States District Court for the Northern Division of California, First Division.*

No. 7824.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation, LOUIS HENRICH, and R. SAMET,
Defendants.

**Assignments of Error.**

Comes now plaintiff in error, the United States of America, by Annette Abbott Adams, United States

Attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

That the said District Court erred in sustaining the demurrer of defendants to the information of plaintiff on file therein on the grounds set forth in said demurrer.

II.

That the District Court erred in dismissing the information of plaintiff on file therein.

III.

That the said District Court erred in not giving, making and entering its order in said action, overruling the demurrer of defendants to the information on file therein.

IV.

That the said District Court erred in sustaining the demurrer of defendants to the information of plaintiff on file therein, inasmuch as it appeared from said information that defendant wilfully, unlawfully and knowingly, sold for [21] beverage purposes and not for export, beer which contained as much as one-half of one per cent of alcohol by both weight and volume, in violation of the Act of November 21st, 1918.

WHEREFORE, the United States of America, plaintiff in error, prays that the above and foregoing assignments of error be considered. The assignments of error upon the writ of error, and further prays that the judgment heretofore made and entered in this case, may be reversed, and held for naught, and

that the plaintiff in error have such and further relief as may be in conformity to law and the procedure of this Court.

Dated this 21st day of August, 1919.

ANNETTE ABBOTT ADAMS,
United States Attorney;
CHARLES W. THOMAS, Jr.,
Assistant United States Attorney,
Attorneys for Plaintiff, Plaintiff in error.

[Endorsed]: Filed Aug. 21, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [22]

---

*In the Southern Division of the District Court of the United States for the Northern District of California, First Division*

No. 7824.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RAINIER BREWING COMPANY, Corporation, LOUIS HENRICH, and R. SAMET,
Defendants.

**Order Allowing Writ of Error.**

Upon the filing of a petition for a writ of error in the above-entitled Court, and good cause appearing therefor, it is hereby ordered that the said petition for a writ of error be allowed; that a writ of error from the judgment heretofore made and entered herein be and the same is hereby allowed for a review

of said judgment by the United States Circuit Court of Appeals for the Ninth Circuit; and that the Clerk of this Court be directed and he is hereby directed to transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit a full, true, complete and certified transcript of the records, proceedings and papers in the above-entitled cause.

It is further ordered that no bond on writ of error, or supersedeas bond, or bond for cause or damages, shall be required to be given or filed.

Dated this 21st day of August, 1919.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Aug. 21, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [23]

---

**Certificate of Clerk U. S. District Court to Transcript on Writ of Error.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do *hereby that* the foregoing 23 pages, numbered from 1 to 23, inclusive, contain a full, true and correct transcript of certain *and* proceedings, in the case of the United States of America vs. Rainier Brewing Company, a Corp., Louis Henrich and R. Samet, No. 7824, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on writ of error (copy of which is embodied in this transcript), and the in-

structions of the Attorney for plaintiff and plaintiff in error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of Five Dollars and Five Cents ($5.05).

Annexed hereto is the original citation on writ of error (page 27), and the original writ of error (page 25), with the return of the said District Court to said writ of error attached hereto (page 26).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 26th day of August, A. D. 1919.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [24]

---

**Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Southern Division, First Division GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between United States of America, plaintiff in error, and Rainier Brewing Company, a corporation, Louis Henrich and R. Samet, defendants in error, a mani-

fest error hath happened, to the great damage of the said United States of America, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 21st day of August, in the year of our Lord one thousand nine hundred and nineteen.

[Seal] W. B. MALING,
Clerk of the United States District Court.
By C. M. Taylor,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,
U. S. Dist. Judge. [25]

Due service of the within admitted this 21st day of August, 1919

THEODORE A. BELL,
Attorney for Defendants and Defendants in Error.

[Endorsed]: No. 7824. In the Southern Division of the United States District Court for the Northern District of California, First Division. United States of America, Plaintiff in Error, vs. Rainier Brewing Company, a Corporation, Louis Henrich and R. Samet, Defendants in Error. Writ of Error. Filed Aug. 21,1919. W B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.

---

**Return to Writ of Error.**

The answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was on the 21st day of August A. D. 1919, duly lodged in the case in this Court for the within named defendant in Error.

By the Court.

[Seal] WALTER B. MALING,

Clerk U. S. District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk. [26]

---

**(Citation on Writ of Error.)**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Rainier Brewing Company, a Corporation, Louis Henrich and R. Samet, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, Southern Division, First Division, wherein United States of America is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. C. VAN FLEET, United States District Judge for the Northern Dis-

trict of California, this 21st day of August, A. D. 1919.

WM. C. VAN FLEET,
United States District Judge. [27]

Due service of the within admitted this 21st day of August, 1919.

THEODORE A. BELL,
Attorney for Defendants and Defendants in Error.

[Endorsed]: No. 7824. In the Southern Division of the United States District Court for the Northern District of California, First Division. United States of America, Plaintiff in Error, vs. Rainier Brewing Company, a Corporation, Louis Henrich, and R. Samet, Defendants in Error. Citation on Writ of Error. Filed Aug. 21, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.

---

[Endorsed]: No. 3383. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. Rainier Brewing Company, a Corporation, Louis Henrich and R. Samet, Defendants in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed August 26, 1919.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3383.

IN THE

# United States Circuit Court of Appeals

In and for the Ninth Judicial Circuit,
United States of America

UNITED STATES OF AMERICA,
*Plaintiff in Error,*

vs.

RAINIER BREWING COMPANY, a corporation, LOUIS HEINRICH and R. SAMET,
*Defendants in Error.*

Writ of Error from United States District Court for the Northern District of California, First Division.

# BRIEF OF PLAINTIFF IN ERROR

ANNETTE ABBOTT ADAMS,
United States Attorney,

CHARLES W. THOMAS, JR.,
Assistant United States Attorney,
*Attorneys for Plaintiff in Error.*

No. 3383.

IN THE

# United States Circuit Court of Appeals

In and for the Ninth Judicial Circuit,
United States of America

UNITED STATES OF AMERICA,
*Plaintiff in Error,*

vs.

RAINIER BREWING COMPANY, a corporation, LOUIS HEINRICH and R. SAMET,
*Defendants in Error.*

Writ of Error from United States District Court for the Northern District of California, First Division.

---

## STATEMENT OF FACTS.

---

On the 3rd day of July, 1919, an information was filed by the United States Attorney for the Northern District of California, charging the defendants in error with the violation of the War-time Prohibition Act (Act of November 21, 1918).

Thereafter, on the 14th day of July, 1919, the defendants in error demurred to the information.

The demurrer was argued and submitted and on the 28th day of July, 1919, the District Court rendered a decision sustaining the demurrer and on the same day judgment was entered dismissing the information.

The language of the Act of November 21, 1918, pertinent to this issue is as follows:

> "* * * No beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes, * * *"

The information charged that the defendants did:

> "* * * in violation of the Act of November 21, 1918, wilfully, unlawfully and knowingly sell to one Jerry Sheehan for beverage purposes and not for export ten (10) boxes, each containing two (2) dozen bottles of beer, which beer contained as much as one-half of one per cent of alcohol by both weight and volume * * *"

Defendants demurred generally and on the ground that:

> "The said information does not state facts sufficient to constitute a public offense, in that it is not alleged therein nor does it appear therefrom, that the beer alleged to have been sold by the defendants was of an intoxicating malt or vinous liquor, or an intoxicating liquor."

The matter at issue and in contention here is the construction of the language of the act quoted supra.

The gist of the matter is: Must it be alleged, and consequently proved, in operating under this act, that the beer, subject of the sale, is intoxicating.

Plaintiff in Error submits that it is not necessary.

Plaintiff in Error has assigned the following errors:

I.

That the said District Court erred in sustaining the demurrer of defendants to the information of plaintiff on file therein on the grounds set forth in said demurrer.

II.

That the District Court erred in dismissing the information of plaintiff on file therein.

III.

That the said District Court erred in not giving, making and entering its order in said action, overruling the demurrer of defendants to the information on file therein.

IV.

That the said District Court erred in sustaining the demurrer of defendants to the information of plaintiff on file therein, inasmuch as it appeared from said information that defendant wilfully, unlawfully and knowingly, sold for [21] beverage

purposes and not for export, beer which contained as much as one-half of one per cent of alcohol by both weight and volume, in violation of the Act of November 21st, 1918.

## ARGUMENT.

The presentation of the contention of Plaintiff in Error will be made under the following heads:

1. The history and purpose of the act.

2. All beer irrespective of its intoxicating properties is within the statute.

3. Under the terms of the statute beer is defined as intoxicating irrespective of its alcoholic content.

## HISTORY AND PURPOSE OF THE ACT.

This statute was enacted under the war power. It had its inception at a time when the United States, together with its assoicated powers, was putting forth its utmost efforts to win the war. No consideration of private inconvenience or loss was to stand in the way of the effective and successful prosecution of the war. Nor was it a time for the placing upon the statute books of law which was not capable of prompt, efficacious and uniform enforcement. Action, not discussion, was sought and needed.

The purpose of the Act is stated to be "conserving the man power of the Nation and to increase

efficiency in the production of arms, munitions, ships, food and clothing for the Army and Navy." Its purpose was to withdraw man power from activities not essential to the winning of the war in order that this same man power might be applied to those activities directly necessary to the successful prosecution of the war. Such a purpose would equally embrace beverages non-intoxicating as well as intoxicating.

To accomplish this purpose Congress forbid the sale of certain beverages whose well-known large production and consumption constituted a heavy drain upon both the man and food resources of the country.

Doubtless for this reason and perhaps also because they were regarded as injurious to man power the manifest purpose of Congress was to class generally as non-essential *alcoholic* beverages. Accordingly the Act prohibits, by name, the best known and most largely consumed beverages of this class, i. e., distilled spirits, beer and wine, beverages which are generally recognized as more or less intoxicating. And to embrace other similar but less well known beverages there were added the words "or othes intoxicating malt or vinous liquor."

An Act of Congress must if possible be so construed as to give effect to every part. If it had been the intention of Congress to leave it to the jury in each case to determine whether a particular malt or vinous liquor is intoxicating and to prohibit only such as may be found in this way to be intoxicating the use of the words "beer" and "wine" was idle. This object would have been accomplished by simply prohibiting "all intoxicating malt and vinous liquors." The plain meaning and intention of Congress and the only way to give effect to these words is to construe that whatever beverages come within the commonly understood meaning of "beer" or "wine" are prohibited and that the prohibition is then extended, by general words, to other beverages which are similar to "beer" and "wine" with respect to being malt or vinous and also with respect to their alcoholic content or intoxicating qualities.

The States have seen this and in passing prohibition laws have always enumerated by name the best known alcoholic or intoxicating liquors and added general language to include other similar beverages. Anl Congress has followed the same course in this Act.

Beer is usually admitted to be an intoxicating beverage and is so classed in the public mind

whether a particular quantity will make a particular man drunk or not.

THE ACT OF NOVEMBER 21, 1918, APPLIES TO ALL BEER, IRRESPECTIVE OF ITS ALCOHOLIC CONTENT AND IRRESPECTIVE OF WHETHER OR NOT IT WOULD BE FOUND ON INVESTIGATION IN COURT TO BE INTOXICATING IN FACT.

The statute is in part as follows:

"After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export."

The first and important thing to observe is that the particular articles enumerated and dealt with are "beer, wine, or other intoxicating malt or vinous liquor." The words "beer or wine" are followed by the general and less definite words, "other intoxicating malt or vinous liquor."

According to established and well-sustained canons of construction the first words, "beer" and "wine," fix and determine the character of the

comprehensiveness, while the expression which follows them must be treated as referring only to things which are ejusdem generis with beer and wine, i. e., to liquors which are in the same general class with that drink named "beer."

*Brooms Legal Maxims,* side page 651.

*Sutherland on Statutory Construction,* Sec. 268.

Where general words follow particular words the true rule of interpretation is to construe the general words as applicable only to the same sort of things as those which are particularly mentioned.

*Gates & Son Co.* vs. *City of Richmond,* 49 S. E. 965.

*Casher* vs. *Holmes,* 2 Barn. & Ad. 592.

*Misch* vs. *Russell,* 136 Ill. 22, 26 N. E. 528, 12 L. R. A. 125.

In violation of this rule, defendants in error would interpret the statute to read, "no intoxicating beer, intoxicating wine or other intoxicating male or vinous liquor shall be sold for beverage purposes." By this forced realing no field of operation would be left for the word "beer." It is a cardinal rule in the construction of statutes that some meaning must if possible be given to every part and every word. Beer is a malt liquor and intoxicating malt liquors are covered by the

catch-all phrase of the statute. If the word "intoxicating" is read before beer, then intoxicating malt liquors are covered twice by the statute. Beer is the name of a liquor which is fermented, but not necessarily intoxicating.

*Blatx* vs. *Rohrbach,* 116 N. Y. 450.

Congress used the word "beer" because it has a widely employed definite meaning, being the common every-day name of a much-liked drink which everybody recognizes by that designation. This thing named "beer," as a practical every-day matter of common sense, was looked upon by Congress as sufficiently harmful or useless or not needed during the war period to justify prohibiting its sale. This meaning of the word is consonant with the conception of the general public, the Courts and the departments of Government for many years.

*Henderson* vs. *Wickham,* 92 U. S. 159.

*Purity Extract Co.* vs. *Lynch,* 226 U. S. 192, 204.

For nearly twenty years the Bureau of Internal Revenue has treated beer containing one-half of one per cent or more of alcohol as a malt liquor. It is very significant that during all this time the brewers of the country have acquiesced in this definition of beer and have paid taxes on all beer

containing one-half of one per cent or more of alcohol without protest or litigation. This definition of beer and the standard of content of one-half of one per cent of alcohol, so long enforced by the Bureau of Internal Revenue, received legislative confirmation in the Act of October 3, 1917, Section 307. This legislative confirmation was reiterated in the Revenue Act of February 24, 1919, Sec. 608.

The Act of June 13, 1898 (32 Stat. 448) imposed a tax on "all beer, lager beer, ale, porter and other similar fermented liquors brewed or manufactured and sold," etc.

The Act of April 12, 1902 (30 Stat. 96) imposed a tax on all beer, etc., in the same language. This statute (Sec. 3339 R. S.) continued in force until the Act of September 8, 1916 (39 Stat. 783). The Act of September 8, 1916, Sec. 400, increased the tax but attempted no further definition or description of "beer."

Section 3244, R. S., defines "brewer" as follows:

> Every person who manufactures fermented liquors of any name or description for sale from malt, wholly or in part, or from any substitute therefor, shall be deemed a brewer.

In Treasury Decision 514, issued April 30, 1902, the Commissioner of Internal Revenue held that

a preparation called "beerine extract" containing 49-100 of one per cent of alcohol by volume was not beer.

In Treasury Decision 1307, issued February 5, 1908, it was stated:

> In reply you are advised that after careful consideration, I have reached the conclusion that while Section 3339, Rev. St., requires the payment of the tax of $1 per barrel on all beer, lager beer, ale, porter and other similar fermented liquors, the practical administration of the law necessitates the fixing of a point below which the alcoholic content is too inconsiderable to class the beverage as either of the liquors enumerated above, or similar thereto, or to bring same within the consideration of the Internal Revenue laws. The practice and rulings of this office have already fixed this point as one-half of one per cent in the case of sales of beverages of this character, and I see no sufficient reason for making a distinction between the manufacturer and dealer in this class of beverages.
>
> It is therefore held that beverages containing not more than one-half of one per cent of alcohol by volume do not come within the consideration of the Internal Revenue laws either as to manufacture or sale.

See also

T. D. 1360, issued May 19, 1908;
T. D. 2354, issued August 2, 1916;
T. D. 2370, issued September 18, 1916;
T. D. 2410, issued December 8, 1916.

It was perfectly within the power of Congress to include in the Act of 1918 "beer" non-intoxicating as well as intoxicating. A statute declaring certain liquors intoxicating within the meaning of the law governing intoxicating liquors, irrespective of the real inebriating quality of such liquors, is not in violation of the Constitution.

*Purity Extract Co.* vs. *Lynch,* 226 U. S. 192.

There the Court, speaking of Poinsetta, a non-intoxicating liquor prohibited by statute, said (page 201):

> It is also well established that, when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government.

A State or the United States may adopt such measures as are reasonable, proper or needful to render the exercise of the power to prohibit the liquor traffic effective. When Congress is given authority over a subject matter, it may enact legislation having a reasonable relation to that end.

Congress may adopt not only the necessary but the convenient means necessary to the exercise of its power over the subject matter within its purview, and such means may partake of the quality of police regulations. On these principles Federal and State Courts have sustained laws prohibiting the sale of quasi intoxicating beverages because such prohibition bears reasonable relation to the end sought by the original prohibition.

*Crane* vs. *Campbell,* 245 U. S. 304, 307;

*Hake* vs. *U. S.,* 227 U. S. 309;

*U. S.* vs. *Cohn,* 2 Ind. Terr. 474, 52 S. W. 38;

*States* vs. *Frederickson,* 101 Maine 37;

*State* vs. *O'Connel,* 99 Maine 61, 58 Atlantic 59;

*Commonwealth* vs. *Blos,* 116 Mass. 56;

*Commonwealth* vs. *Anthes,* 12 Gray (Mass.) 29;

*Commonwealth* vs. *Brelsford,* 161 Mass. 61;

*State of Maine* vs. *Piche,* 98 Maine 348;

*Commonwealth* vs. *Snow,* 133 Mass. 575;

*State* vs. *Intoxicating Liquors,* 76 Iowa 243;

*State* vs. *Guinness,* 16 Rhode Island 401;

*State of Iowa* vs. *Yager,* 72 Iowa 421;

*Ex parte Jacob Lockman,* 18 Idaho 465, 110 Pac. 253;

*Pennell* vs. *State,* 123 N. U. (Wis.) 115.

It is matter of public notoriety that scientific men are in dispute as to the quantity of alcoholic content of a beverage required to make it intoxicating in fact. Mr. Justice Hughes recognized in *Purity Extract Co.* vs. *Lynch,* 226 U. S. 192, 204, that beverages of the type involved in the case at bar belong to a class which the public in general look upon as intoxicating.

The War Department, in administering Section 12 of the Draft Act of May 18, 1917, prohibiting the sale to soldiers of "intoxicating liquor, including beer," while recognizing that under the statute as worded the Courts must determine whether a particular drink is intoxicating, have treated beverages with an alcoholic content of 1 4-10 per cent as intoxicating.

In *U. S.* vs. *Cohn,* 2 Ind. Terr. 474, 492-501, the Court had before it for interpretation an Act of Congress making it a crime to sell "any vinous, malt or fermented liquors or any other intoxicating drinks." It was reld that the statute included a malt beverage shown to be non-intoxicating in fact.

In these circumstances, it was not only reasonable but it was conceivably essential for Congress, in order to accomplish its purpose, to determine that all beer, irrespective of its alcoholic content,

should be treated as "intoxicating" and that it should not be left open to judicial investigation whether any particular article of beer would intoxicate. It is maintained that the true interpretation of the Act of November 21, 1918, is that Congress has already determined that the article "beer," without regard to the alcoholic content, is in the class of "intoxicating" beverages and has thereby designedly foreclosed any inquiry into the matter by a court.

When Congress used the word "beer" it intended to, and as we contend did, include all beer whether intoxicating or non-intoxicating.. Where a statute expressly forbids the sale of a certain class of liquors, non-intoxicating as well as intoxicating liquors of that class are included within the prohibition.

There are three reasons that occur to us why the word "beer" as used by Congress i nthis legislation includes within its scope non-intoxicating as well as intoxicating liquors: (1) The word "beer" is defined to be "a fermented liquor made from any malt grain with hops and other bitter flavoring matters." Thus the determining characteristic of beer is not its alcoholic content, but whether it is a malt liquor. (*Tinker* vs. *State,* 90 Ala. 647.) (2) For the practical enforcement of the law it

was necessary to bar all subterfuges. (3) As a prohibition statute, to conserve man power, it is just as necessary to forbid beverages of small alcoholic content as beverages of large alcoholic content, because while the former may not readily intoxicate unless drunk in quantity, nevertheless it is doubtless equally harmful in creating the desire and the appetite, for the very reason that indulgence may be often repeated before complete intoxication ensues.

The primary rule of statutory construction makes it essential and the object of all interpretation of statutes is to ascertain the intention of the legislature, to the end that the same may be enforced. The meaning and intention must be sought first of all in the language of the statute itself. As secondary helps in arriving at the intention of the legislature, the scope and purpose of the enactment, the evil to be remedied and the history of the times should be considered. These secondary aids to construction may be used when the language of the statute is not clear or is ambiguous. If it can be said that the present statute is not clear when it says no "beer, wine," etc., then we insist there can be no doubt that the word "beer" was intended to include both intoxicating and non-intoxicating beer when the scope and purpose of the Act are considered and the circumstances and

national situation under which the Act was passed are coneemplated. Congress was enacting legislation to conserve food, fuel and man power, and was limiting the ordinary activities of individuals in a manner heretofore unknown in the history of this country. The amount of flour to be used in bread, the amount of sugar for each individual, had been restricted and many other limitations had been placed upon what the people could eat and drink. To save to the uttermost food to win the war, and to conserve our man power which was essential to victory were the thoughts before Congress when this Act was passed. It would be absolutely inconsistent with the spirit of the times to construe the Act so that beer containing 2¾ per cent of alcohol by weight could be manufactured and sold. Congress had clearly in mind and believed that the consumption of liquor containing alcohol weakens or minimizes the man power of the nation; that the food products of the country were being wasted in the making of beer; that the man power was being crippled by the failure to speed up food production and war materials; that the fuel supply was short, and the coal producers had appealed to the Government to close the liquor saloons; that there were many people manufacturing, handling and selling beer and wine; that it was a waste of energy much needed in useful industry.

The defendants in error claim that the phrase in the Act of November 21, 1918, "other intoxicating malt or vinous liquor" modifies and qualifies the words "beer" or wine," and that the statute should be read as if it said "no intoxicating beer, intoxicating wine or other intoxicating male or vinous liquor shall be sold."

Section 211 of the United States Criminal Code makes non-mailable every "obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character."

At a time prior to the insertion in the section of the word "leteer," it was held in *United States* vs. *Chase,* 135 U. S. 258-9, that a sealed letter was not a "writing" within the meaning of this law because, on the doctrine of noscitur a sociis, the word "writing" must be restricted to the types of articles which had been published; that the effect of the use of the word "publication" following the word "other" in the catch-all clause, was to restrict the somewhat ambiguous word "writing" to its usual and ordinary meaning, of a document which had been given publicity, and to prevent the inclusion therein of a type of document, to wit, a letter—not ordinarily considered a "writing."

Following the Chase decision, the statute was amended so as to include therein the word "letter." Thereupon the District Courts rendered a number of divergent decisions upon the question as to whether a sealed letter was a "letter" within the meaning of the statute, it being plain that such a letter was never published and was not of the same class or kind as a "publication." Examples of these cases are:

*United States* vs. *Wilson,* 58 Fed. 768, 770-1;

*United States* vs. *Andrews,* 58 Fed. 861.

The controversy was settled by the Supreme Court in *Andrews* vs. *United States,* 162 U. S. 420, 423-4, where it was held that the statute embraced letters even though not published.

See also *Leisy Brewing Co.* vs. *Atchison, etc., Co.,* 225 Fed. 753.

Prior to the passage of the Act of November 21, 1918, in only one instance, so far as known, has a Federal Court construed a statute of the United States of substantially identical wording. In *United States* vs. *Cohn,* 2 Ind. Terr. 474, 52 S. W. 38, the defendant was indicted for selling in the Indian Territory a malt liquor called "Rochester Tonic." There was an acquittal, but under the statutory system prevailing in the Territory, the

United States was permitted to appeal and did so. The Act of March 1, 1895 (28 St. 693), prohibited the selling, etc., of any "vinous, malt or fermented liquors, or any other intoxicating drinks of any kind whatsoever." The question was whether the malt liquor in question (Rochester Tonic) was included, notwithstanding the fact that it was shown not to be intoxicating. The Trial Court held that it was not included. The appellate tribunal held that it was included and that the adjective phrase "other intoxicating drinks" did not relate back so as to qualify or limit the words "vinous, malt or fermented" employed in the fore part of the sentence, saying (page 493):

> It is contended by the learned counsel for the defendant that the words "any other intoxicating drinks" used after the language prohibiting the manufacture, sale, giving away, etc., of any vinous, malt, or fermented liquors, are to be taken as words limiting and explaining the meaning of those words which precede them to be that the articles thus named are intoxicating also. We think that this is not necessarily the only construction that can be given to the words. We have already seen that the legislature, in the exercise of the police powers of the government, may, acting upon a subject within its powers, designate even a harmless article as being hurtful, and that such designation is binding on the courts. So in this case we think that the statute is subject to the construction that Congress intended to

> say that vinous, malt, and fermented liquors were intoxicating, and then, because a large class of intoxicants, such as whiskies, brandies, gin, and all other ardent and spirituous liquors, had not been named in the statute, the words "all other intoxicating liquors" were intended to cover them. And, whatever may be the exact grammatical construction of the language, courts are not always bound to follow it. If, by other methods allowed by the law, it can be determined that Congress otherwise intended, the Court will give such construction to the statute as by lawful methods it may find Congress actually intended. The intent of the statute is law.

In a number of States there have been decisions in complete harmony with the Cohn case, where the statutes involved were substantially identical in wording with the statute involved in the case at bar. Among these are the following:

*State* vs. *Ely,* 22 S. Dak. 487, 492-3, wherein the statute made it an offense to sell without license "any spirituous, vinous, malt, brewed, fermented or other intoxicating liquors."

*La Follette* vs. *Murray,* 81 Ohio St. 474, wherein the statute imposed a tax on the business of selling "spirituous, vinous, malt or other intoxicating liquors."

*Fuller* vs. *Jackson,* 97 Miss. 237, 253-6, and *Extract & Tonic Co.* vs. *Lynch,* 100 Miss. 650, wherein

the statute made it a crime to sell "vinous, alcoholic, malt, intoxicating, or spirituous liquors, or intoxicating bitters, or other drinks, which if drank to excess will produce intoxication."

*Marks* vs. *State,* 48 So. Rep. 864, 867, wherein an Alabama statute made it an offense to sell "alcoholic, spirituous, vinous or malt liquors, intoxicatign bitters, or beverages by whatever name called, which if drunk to excess will produce intoxication."

*In re Lochman,* 18 Idaho 465, 469, wherein the statute provided that the words "intoxicating liquors" as used therein should be deemed to include "spirituous, vinous, malt and fermented liquors, and all mixtures and preparations thereof, including bitters and other drinks that may be used as a beverage and produce intoxication."

In all these cases it was held that the adjective "intoxicating" following the word "other" or the adjective phrase relating to intoxicating articles following the word "other" did not relate back to or qualify the specifically enumerated articles. With substantial uniformity, the reason assigned for the conclusion was that it was evidently the intention of the legislature itself to determine that the specifically enumerated articles belonged in the class of intoxicating beverages, and thereby to foreclose litigation in the courts as to whether or not any

particular one of the specified articles was intoxicating in fact. In all of them, where the question arose, it was held in addition, in conformity with *Purity Extract Co.* vs. *Lynch,* 226 U. S. 192, that the legislature had the power thus to determine and thereby to accomplish the legislative purpose.

See also *Brown* vs. *State,* 17 Ariz. 314, wherein the provision related to "ardent spirits, ale, beer, wine or intoxicating liquor of any kind," and the Court commented extensively and favorably upon the Cohn case, supra.

That if Congress intended, in the interest of conservation, to prevent the use of food in the manufacture of beer, there was reasonable relation to that purpose in prohibiting sales of beer, after the lapse of two months from the date set for the going into effect of the prohibition on the use of foods, is likewise held in *Purity Extract Co.* vs. *Lynch, supra.* Whatever may have been the motive of Congress, in the exercise of its power, it had authority to include all reasonably related provisions it might deem essential to the complete exercise of its power.

> *United States* vs. *Doremus,* decided by the Supreme Court of the United States March 3, 1919, No. 367, October term, 1918, and the cases therein cited.

UNDER THE TERMS OF THE STATUTE BEER IS DEFINED AS INTOXICATING IRRESPECTIVE OF ITS ALCOHOLIC CONTENT.

But even if counsel for Defendants in Error should take the position that the words following do influence the meaning of the word "beer" it is the contention of Plaintiff in Error that Congress has in the Act itself defined the beer therein mentioned to be intoxicating.

Perhaps the contention as to the meaning of the words "other intoxicating liquors" may be illustrated by the following examples:

What is meant by "dogs or other animals"? Can there be any doubt that a statute thus worded would at least indirectly define a dog as an animal?

Suppose Doe should say of Roe, "Roe and those other lying, cowardly crooks." Can any one doubt that Roe would miss the meaning or that the net result of the statement would be a fight or a lawsuit?

Thomas Nelson Page in one of his Pastime Stories, "He Knew What Was Due the Court," has the character in the story give the following reason why he was released from the asylum:

"Well, you see, when I got to the asylum where that rascal got me sent, the board was in session

and I knew most of them, and their fathers before them; and they asked me what I was doing there and I made a clean breast of the whole thing—all about *that scoundrel who had been robbing me, and you and those two other fools,* and all; and that I had a damned more sense than all of you put together; and they said that they knew you all and that I was right."

Mark Twain in his introductory paragraph to "Extracts from Adam's Diary" makes use of the method:

"The new creature with the long hair is a good deal in the way. It is always hanging around and following me about. * * * *I wish it would stay with the other animals."*

These examples have been chosen at random from a casual reading, but they might be multiplied from writers, classical as well as modern, particularly from humorists and orators using invective.

The force and point of it all is, that every one, who reads or hears, knows unerringly that the words following are definitive of the preceding words. If this were not so the expressions would be meaningless.

In analyzing the word structure of the sentence no other theory can be formed than that Congress

by the Act said that "beer," irrespective of alcoholic content, is, so far as this Act is concerned, "intoxicating liquor." Otherwise there is no necessity for the word "other" i nthe Act.

Assume that the wording of the Act had been, "beer, wine or other liquors which are intoxicating," the language would then mean that Congress treated and defined beer as an intoxicating liquor and that it meant to bring within the meaning of the Act all other liquors which were intoxicating.

In such a case beer would be defined i nthe Act as an intoxicating liquor and hence a question of law, while to make a case on other intoxicating liquors, it would be necessary, in the absence of Judicial Notice, to prove as a fact that the other beverages were in fact intoxicating.

There is no little authority to sustain this contention.

The rule has been stated as follows:

> "Any liquor which is named or plainly included in the statute must be held to be intoxicating, as a matter of law, without inquiry into its actual properties, and even though, as a matter of fact, it is not capable of producing intoxication."

23 Cyc. 57, 58.
*States* vs. *Intoxicating Liquors,* 76 Iowa 243, 41 N. W. 6, 2 L. R. A. 408.

*Commonwealth* vs. *Timothy S. Gray* (Mass.) 480.

*State* vs. *Wittmar,* 12 Mo. 407.

*Roberson* vs. *State,* 100 Ala. 123, 14 So. 869.

"It is presumption of law that fermented liquors are intoxicating."

23 Cyc. 60.

*State* vs. *Volmer,* 6 Kan. 371.

*State* vs. *Spaulding,* 61 Vt. 505, 17 Atl. 844.

"If the statute specifically forbids the unlicensed sale of 'Male liquor' the question of the intoxicating properties of the liquor sold is immaterial; it is only necessary to determine whether it was a malt liquor."

23 Cyc. 60.

*Eaves* vs. *State,* 113 Ga. 749, 39 S. E. 318.

*State* vs. *O'Connell,* 99 Me. 61, 58 Atl. 59.

"The preponderance of authority is to the effect that when the word 'beer' is used, without any restriction or qualification, it denotes an intoxicating malt liquor; that when thus occurring in a nindictment or complaint, or in the evidence it is presumed to include only that species of beverage and that, being taken in that sense, it will be sufficient, unless it is shown that the particular liquor so described was non-alcoholic."

*Black on Intoxicating Liquors,* Sec. 17 and cases cited.

"This position seems to us unquestionably sound. It is supported by the following reasons: First, it is only in a secondary or derivative sense that the word 'beer' is used as descriptive of any liquor other than malt beer. Second, when used in relation to any non-alcoholic extract or infusion, it is properly (and almost invariably) qualified by the addition of a descriptive term as 'root beer,' 'spruce beer,' 'ginger beer,' etc. Third, when used in barrooms and drinking saloons and generally in connection with the sale of intoxicants, the word 'beer' never denotes anything but an intoxicating malt liquor."

The cases are many which hold that the catch-all clause "other" takes for granted and means that the words preceding it are considered to be of the same kind and class as those described in the words following it.

It is therefore submitted that Congress did define all beer, irrespective of its alcoholic content, as intoxicating liquor under the terms of this Act, and inasmuch as it is thus treated by Congress the Court should take Judicial notice of the fact that "beer" as mentioned in this Act is, as a matter of law, an intoxicating malt liquor.

It has been urged that Congress was only interested in prohibiting the drinking of beverages which were as a matter of fact intoxicating, and that consequently beer which was not in fact intoxicating was not intended to be included within the terms of the statute.

Assuming for the purpose of the argument that such was Congress' purpose and desire it is submitted that Congress has still prohibited the sale of any beer no matter what its alcoholic content. There are few matters

upon which men and experts differ so widely and honestly, too, as to what is intoxicating and as to when a man is intoxicated.

It is plain to see why Congress, if it desired the law to be effective, did not leave its prohibition dependent upon how a jury in each case would determine the intoxicating qualities of a particular beverage. The word "intoxicating" can scarcely be said to have a definite meaning. It denotes different things to different minds. There are almost as many meanings as there are men. It is ordinarily defined to mean:

"Producing intoxication or feelings like those of intoxication; exhilarating; exciting; maddening or stupefying with delight."—*Standard Dictionary.*

But men will differ as to what is exhilarating or exciting. Opinions run the gamut from a gentle glow to bestial insensibility in the gutter. One man will regard as intoxicating what another will consider as too mildly exhilarating to be within the term. One expert, according to his standard of intoxication, will deem a given per cent of alcohol sufficient to render a beverage intoxicating, while another will differ wholly from him. What will make one man drunk will have no apparent effect upon another. A drink which will have no effect upon a man at one time will at another time make the same man drunk. A law whose enforcement depends upon the determination by juries of such a question would be most erratic of operation and a uniform administration of it would be impossible. Into such an enforcement under such conditions would enter the local prejudices and individual opinions of the people of a community to an extent

which would be unfair both to the government and to the possible defendant.

By reason of this confusion and this divergence of opinion the enforcement of the law would be uncertain and difficult, no matter how conscientiously it might be administered. Therefore it might very well be that Congress, though it felt that there was no objection to the drinking of beer with a small or negligible alcoholic content, still, knowing the practical and every-day difficulties of such a matter, prohibited the sale of all beer in order that the main purpose of the Act might be certain of results even though some beverages, not intoxicating in themselves, were included in the prohibition. Looking at the matter from a practical every-day viewpoint, it is submitted that the construction herein urged is sound.

It is therefore submitted that it is not necessary for the Government in prosecutions under this statute to allege and prove that beer is, in fact, intoxicating; and that the Court erred in sustaining defendants' demurrer and in entering its order dismissing defendants.

ANNETTE ABBOTT ADAMS,
United States Attorney,

CHARLES W. THOMAS, JR.,
Assistant United States Attorney,
*Attorneys for Plaintiff in Error.*

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>*Plaintiff in Error,*<br>vs.<br>RAINIER BREWING COMPANY, a Corporation, LOUIS HEINRICH and R. SAMET,<br>*Defendants in Error.* | No. 3383. |

## BRIEF OF DEFENDANTS IN ERROR.

THEODORE A. BELL,
Attorney for Defendants in Error,
1002-5 Hobart Building,
San Francisco, California.

THE RECORDER COMPANY, 689 STEVENSON ST., S. F.

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>*Plaintiff in Error,*<br>vs.<br>RAINIER BREWING COMPANY, a Corporation, LOUIS HEINRICH and R. SAMET,<br>*Defendants in Error.* | No. 3383. |

## BRIEF OF DEFENDANTS IN ERROR.

The defendants in error have served and filed a notice herein that at the time fixed for the argument on the writ of error in this action they will move for a dismissal of the writ upon the ground that the order and judgment of the District Court are not reviewable by the Circuit Court of Appeals, and that this Honorable Court has no jurisdiction to entertain such writ. We deem it sufficient to cite the following authorities in support of this motion:

*U. S.* v. *Sanges,* 144 U. S. 310, 36 L. Ed. 445;
*U. S.* v. *Dickinson,* 213 U. S. 92, 53 L. Ed. 711;
*U. S.* v. *Evans,* 213 U. S. 297, 53 L. Ed. 803;
*U. S.* v. *Bitty,* 208 U. S. 397, 52 L. Ed. 543, 5.

And see note to

*U. S.* v. *Stevenson,* 54 L. Ed. (U. S.) 153.

This rule has been applied in various Circuit Courts of Appeals:

*U. S.* v. *Baltimore etc. R. Co.,* 159 Fed. 33, 38 (C. C. A., Sixth Circuit);
*U. S.* v. *Zarafonitis,* 150 Fed. 97, 99 (C. C. A., Fifth Circuit).

II.

Without waiving our right to insist upon the above motion, we will briefly present the reasons why the demurrer in the court below, was properly sustained.

In the case of *Jacob Hoffman Brewing Co.* v. *McElligott* (District Court for the Southern District of New York), decided May 17, 1919, it was claimed by the plaintiff that the Act of November 21, 1918, commonly known as the "War Prohibition Act", did not prohibit the sale of a non-intoxicating beer. This point was vigorously contested by the government. Judge Hand, granting an injunction against the deputy collector of internal revenue, sustained plaintiff's position, and thereupon an appeal was prosecuted by the United States to the Circuit Court of Appeals for the Second Circuit. All of the judges of the Appellate Court concurred in the opinion that unless beer was in fact intoxicating, its sale was not denounced by the statute in question.

This same question arose in a large number of other District Courts, upon demurrers filed by the defendants to indictments or informations for selling beer. In each case, the government purposely omitted to

allege that the beer was an intoxicating liquor. Demurrers were sustained in the following cases:

*United States* v. *Rainier Brewing Co.* (the instant case);
*U. S.* v. *Baumgartner* (So. Dist. of California), August 8, 1919;
*U. S.* v. *American Brewing Co.* (Eastern Dist. of Louisiana), July 15, 1919;
*U. S.* v. *Mohr* (Western Dist. of Wisconsin), August 22, 1919;
*U. S.* v. *Hanley Brewing Co.* (Rhode Island), July 23, 1919;
*U. S.* v. *Standard Brewing Co.* (Maryland), July 1, 1919;
*U. S.* v. *Petts and Vogel* (Mass.), July 15, 1919;
*U. S.* v. *Porto Rico Brewing Co.* (Porto Rico), August, 23, 1919.

A contrary view was taken in the following cases:

*U. S.* v. *Stenson Brewing Co.* (Northern Dist. of Illinois), July 25, 1919;
*U. S.* v. *Pittsburg Brewing Co.* (Western Dist. of Penn.), July 15, 1919;
*U. S.* v. *Schmauder* (Connecticut), July 23, 1919.

In *U. S.* v. *Bergner & Engel Brewing Co.,* the District Court for the Eastern District of Pennsylvania held that it was a trial question, and for that reason neither sustained nor overruled the demurrer.

It will, therefore, be observed that a great majority of the Federal judges that have passed on this question have sustained our position.

## III.

A proper construction of the clauses of the act of November 21, 1918, forbidding the sale of "beer, wine, or other intoxicating malt or vinous liquor for beverage purposes" after June 30, 1919, requires that the descriptive term "or *other* intoxicating malt or vinous liquor" be deemed to relate back and define the immediately preceding words "beer" and "wine", and if the rule of *noscitur a sociis* is ever to be employed as a canon of construction, it is applicable in the present instance because of the compactness of the whole clause and the close relation of the word "other" to the descriptive or defining word "intoxicating".

This Honorable Court, in the case of *Potts* v. *United States,* 114 Fed. 52, 54, in construing a statute providing "that no person, by force, threats, intimidations, or by any fencing or inclosing, *or any other unlawful means,* shall prevent or obstruct" any person from peaceably entering upon or establishing a settlement upon public lands, followed that doctrine. Circuit Judge Morrow, speaking for the Court, said:

> "By a well-known rule of construction the words 'or any other unlawful means', in describing and giving scope to the prohibited acts, relate back to and qualify the preceding words 'fencing' and 'inclosing', so that those words must be read as *'unlawful* fencing' and *'unlawful* inclosing'."

The same rule of construction has been applied in the following cases:

*U. S.* v. *Chase,* 135 U. S. 255, 258;
*U. S.* v. *United Verde Co.,* 196 U. S. 207, 213;
*U. S.* v. *Loftis,* 12 Fed. 671, 673;

*U. S.* v. *Clark,* 43 Fed. 574;
*Pacific Rolling Mill Co.* v. *Hamilton,* 61 Fed. 476, 477;
*Gridley* v. *Northwestern Ins. Co.,* 14 Blatchf. 107; affirmed 100 U. S. 614.

## IV.

Defendants in error also respectfully claim that the attempt to enforce the penalties prescribed by the Act of November 21, 1918, is beyond the constitutional powers of the government. Assuming, for the purposes of argument, that Congress had the power, in virtue of the emergencies of war, to prohibit the sale of intoxicating liquors, it would seem plain that the expiration of the Act could not be made dependent upon conditions that might happen long after all emergency ceased to exist. If this were not true, then during the stress and exigencies of war, Congress might enact legislation that would continue to be enforceable until the happening of events that might take place years after the war actually came to an end, and thus invade, for a long period, the constitutional control of the several states in matters properly referable to their police powers.

The passing of any war necessity is shown by a consideration of the terms of the armistice, the manner and extent to which it has been carried out and performed by the defeated enemy, which every one knows, and the official statements and action of practically every department of the Government. A large proportion of these statements and action is reported in the Official U. S. Bulletin, which was published

daily by the Committee on Public Information, created by executive order of the President. This publication was an official Government publication, and therefore all official statements therein made by officers whose duty it was to make them, are admissible as evidence of the facts therein contained (Revised Statutes, section 882; *White* v. *United States,* 164 U. S. 100; *Oakes* v. *United States,* 174 U. S. 778; 3 Wigmore on Evidence, section 1630 *et seq.*), and the court should take judicial notice of them.

As is common knowledge, actual warfare has ceased, allied troops are occupying German territory, no enemy force is in France or Belgium, the German navy has been surrendered and a large part of it scuttled, and stupendous quantities of war supplies and materials, etc., yielded up by the enemy, in accordance with the terms of the armistice, to such an extent as wholly to justify the President's declaration that, "having accepted [and performed] these terms of armistice, it will be impossible for the German command to renew [the war]," and the recent acceptance by the Germans of the terms of peace conclusively establishes and confirms that fact.

The reports above referred to include official statements by the President and other Government officials recognizing that the war necessity has passed, referring to immediate discontinuance of induction into service and to the rapidity and extent of demobilization, mentioning the cancellation of contracts for war supplies, removing the restrictions imposed upon manufacture and business for war purposes, and proclaiming the

change in the food, fuel, labor and transportation situation from shortage to sufficiency or surplus and from Government restrictions to the withdrawal of all restrictions.

(1) The President has on a number of occasions referred to the fact that the war was practically ended, and that immediately following the armistice the country was under the necessity of returning with the utmost speed to a peace basis. In his address to Congress on November 11, 1918, he stated that "the war thus comes to an end" and "it will be impossible for the German command to renew it" (Nov. 11, 1918, p. 5).* In his Thanksgiving Proclamation he referred to the complete victory which had brought us peace (Nov. 18, p. 1). In his address to Congress on December 2, he referred to the secure peace which followed the complete submission of the enemy and to the fact that the enemies' empires were in liquidation, that the necessity for taking over the railways had now been served, that the restrictions placed upon industry for war purposes had been removed, and that from the very moment of the armistice "we took the harness off" (Dec. 2, p. 1). On November 30, he approved the recommendation of the Chairman of the War Industries Board that this board be discontinued since it "was only a war making body" (Dec. 5, p. 1), and in his executive order of December 3 he recognized the cessation of the war activities of the government departments (Dec. 5, p. 4). In subsequent statements the

* References, unless otherwise stated, will be to the Official U. S. Bulletin of the date mentioned.

President referred again and again to the fact that "the quiet of peace and tranquillity of settled hopes has descended upon us" (Dec. 27). In his address to the Senate on July 10, 1919, when he presented the Treaty of Peace, he said once more that "the war ended in November, eight months ago."

(2) Statements by other government officials are to the same effect. The Secretary of the Treasury, under date of November 14, referred to "the collapse of our enemies," and "the sudden cessation of the extraordinary demands upon our industry and products, consequent upon the conclusion of the war" (letter to Chairman of Senate Finance Commitee, Official Bulletin, Nov. 15, pp. 1, 6). In his annual report, dated December 2, he said that "the war has been won and peace is assured," referred to "the rapidly changing conditions, incident to the transition from war to peace," and recommended to Congress that the amounts called for in the pending revenue bill be substantially reduced (Dec. 31, p. 7).

In one of the Federal Reserve Board reports subsequent to the armistice, the board referred to the changed position due to the "readjustment of trade and industry to post-war conditions" (Federal Reserve Board Bulletin for May, Official Bulletin, May 12).

The Chemical Warfare Service notified the Nation that it was unnecessary further to continue the saving of various materials required for gas defense purposes (Nov. 27, p. 7). Food Administrator Hoover, on Monday afternoon, November 11, said (Nov. 12, p. 3):

"With the war effectually over, we enter a new economic era and its immediate effect on prices is difficult to anticipate."

(3) The War Department has been straining every effort from the very date of the armistice to demobilize our army and to restore the country to a peace basis. The Secretary of War immediately "suspended further calls under the draft and inductions" (Nov. 11, p. 1), and made the following statement (Nov. 12, pp. 1, 6):

"* * * the President directs that all general and voluntary special calls now outstanding for the induction and mobilization of registrants of whatever color or physical qualifications for the Army, be and the same are, hereby cancelled. * * * The President further directs that all registrants who are already inducted into the Army * * * but who have not been actually entrained for a mobilization camp, shall be and that they are hereby discharged from the Army."

On November 16, the Provost Marshal General directed all state headquarters to cease immediately the physical examination of draft registrants and to discontinue the work of the district boards (Nov. 18, p. 1). In the same month, the War Department issued a circular to all Commanders reading (Nov. 21, p. 1):

"1. The President has determined * * * that the public service will be promoted by the discharge as rapidly as their services can be spared of officers in the United States Army excepting those holding commissions of any kind in the regular Army.

"2. Department Commanders, Commanders of Ports of Embarkation, all Chiefs of Staff, Corps

> and Departments are authorized and directed to discharge such officers of the line and staff as are under their command as rapidly as circumstances permit.
>
> "3. * * * such discharges will be a complete separation of the individual from the military service. * * *"

A circular dated March 28, provides (March 31, p. 5):

> "The attention of all is again directed to the importance of discharging from the military service as rapidly as they can be spared, all men drafted or enlisted only for the period of the emergency."

The army demobilization statistics especially constitute quite conclusive proof that the war necessity has long since passed. The Chief of Staff, following the armistice, issued weekly reports of the progress of demobilization. Men were returned from France in increasing numbers, from 25,000 in November to 200,000 in March, and since then, they have been returned in even larger numbers (Feb. 20, p. 1). By January 24, over 900,000 men and officers had been discharged (Jan. 25, p. 8); by March 24, approximately 1,500,000 men and officers had been discharged (March 24, p. 5); by May 24, the Chief of Staff reported that "the demobilization * * * has reached 2,215,161 * * * A total of 1,152,427 officers and * * * men sailed from Europe since November 11. * * * *All divisions but the regular divisions will have sailed by June 12 from France*" (June 2, p. 8).

The President was, therefore, most moderate in his statement to Congress on May 20, 1919, that—

> "The demobilization of the military forces of the country has progressed to such a point that it seems to me entirely safe now to remove the ban upon the manufacture and sale of wines and beers" (May 26, p. 8).

(4) All contracts for the production of war materials are being terminated with the utmost rapidity, and the surplus supplies bequeathed by the war to a country now practically at peace are being disposed of with equal speed. Shortly after the armistice, the War Department established elaborate machinery for the cancellation of outstanding contracts for war supplies (Nov. 14, p. 1; Nov. 16, pp. 1, 5).

On June 2, the War Department reported that it had suspended the performance of 24,000 supply contracts which would have involved an expenditure of $6,000,000,000; that practical agreements with the contractors had been made as to 2,500 other contracts; that substantially all remaining contracts were being examined for purposes of concellation and that "in spite of the difficulties to be overcome, * * * more than seventy-five per cent. (75%) of the actual work to be done is behind us" (June 2, pp. 10, 11). "Of the uncompleted portions of contracts * * * outstanding on Nov. 9, 1918, only * * * 6 per cent. remained on April 26" (May 22, p. 4). By May 8, 1919, all but eleven of the 1,200 quartermaster's contracts in force abroad had been liquidated (June 16, p. 3).

The War Department has discontinued the construction of and has abandoned scores of training camps, cantonment buildings, proving grounds, army flying fields, storage yards and buildings, sanitation plants, army tent camps, motor school buildings, hospitals and other army construction projects (Dec. 2, p. 14; Dec. 6, p. 2; Dec. 10, p. 3; Dec. 16, p. 3; Dec. 17, p. 2; Dec. 31, p. 2).

Shortly after the armistice, the War Department created a special division for the disposal of war materials purchased for the army, and later appointed a director of sales of such materials (Dec. 10, p. 2; Mar. 3, p. 1). In the first four and one-half month of 1919, this director had sold about a quarter of a billion dollars worth of supplies, including lumber, copper, army animals, caustic soda and ash, iron and steel, nitrates, explosives, motor trucks, locomotives, cranes and wool stocks (May 26, p. 1); by June 20, the total had risen to one-third of a billion (July 7, p. 8). The War Department has transferred about 40,000 motor vehicles to peace departments—Post Office, Public Health Department, Bureau of Public Roads, etc. (June 16, p. 1). The War Department has recently sold $15,000,000 worth of material to Russian cooperative associations (June 30, p. 10). On June 30, the Department called for bids for canned corn, peas and beans which it was holding as surplus in thirteen supply zones of the United States (June 30, p. 11). The Secretary of War went to France in April in order to dispose of all the installations in France, including docks, warehouses and railroad facilities (May

12, p. 14). By March considerable of the ammunition which had been previously sent to France, had already been returned to this country. And the War Department on June 9, 1919, announced that it had rescinded its rule against the enlistment of enemy aliens in the army (June 9, p. 2).

(5) Almost all the restrictions imposed upon commerce and industry for war purposes have now been removed. On November 12 the War Industries Board began (Nov. 13, pp. 1, 7)—

> "a modification of the restrictions whereby it has controlled American industry in the interest of the Nation's war program."

On November 21 the Board anounced the formal cancellation of all except a few outstanding priority ratings (Nov. 21, p. 3), and by December 12 it announced the discontinuance of price-fixing (Dec. 12, p. 4). On November 21, "all remaining restrictions on non-war construction throughout the United States were officially removed" (Nov. 22, p. 1). By January 1, the War Industries Board and the restrictions which it had placed upon American industry for the purpose of prosecuting the war were out of existence (Dec. 5).

The War Trade Board has removed the great mass of the restrictions which it had imposed upon imports and exports for war purposes. A large body of the cable, postal and shipping censorship regulations have been removed (see from Dec., 1918, to May, 1919). On November 14, the Chairman of the Committee on

Public Information announced that the voluntary press censorship had been discontinued (Nov. 14, p. 1).

And it has recently been declared that virtually unrestricted trade by Americans with Germany will now be licensed and permitted (New York *Times,* July 12).

(6) With respect to food products, the Food Administration on December 5 officially reported that there was a sufficient supply for economical use of wheat, rye, beans, peas and rice, and as early as March 3, the War Department began to dispose of its reserve stocks of foodstuffs in France (Dec. 5, p. 7, March 3, p. 2).

The orders for the curtailment of the production of soft drinks had been rescinded by November 14, and the restrictions on the use of all-wheat-bread and the requirement of grain substitutes in bread were rescinded (November 14, pp. 1, 4). By December 11 the restrictions on the use of sugar were lifted (Dec. 11, p. 4). At that early date the Food Administration stated that—

> "The European Nations can again draw upon the wheat supplies in India and Australia. * * *
> "It will also be possible to tap accumulated supplies in the Argentine."

The orders affecting public eating places were rescinded December 23 (Dec. 23, p. 1). Various license requirements were withdrawn with respect to grains, meats and other foods by February 1, and others by March 12 (Feb. 1, p. 1, March 12, p. 1).

The Federal Reserve Board reported by March 27, that the opening of all of the grain supplies of other lands "has naturally operated to curtail the demand for our wheat abroad."

In his second weekly bulletin covering the week ended May 16th, Mr. Barnes, the wheat director of the Food Administration Grain Corporation, stated:

> "The shipments in relief of Europe, outside of the Allies, are now being rapidly completed, and within the next week practically the last shipments of foodstuffs for liberated regions will be completed" (June 2, p. 3).

The surplus of food supplies held by the War Department was ready for announcement early in February, but the supplies were withheld from sale to avoid flooding the food market. On July 8 the surplus stores of meats and vegetables were in excess of $130,000,000 (see testimony of Chief of Staff, U. S. Army, before House of Representatives' sub-committee investigating army food supplies—New York *Times,* July 12).

(7) The grave fuel shortage which confronted the country before the armistice has been succeeded by a fuel surplus, and the restrictive fuel orders have been revoked (Jan. 10, p. 1; Feb. 1, p. 2). On May 15 the United States Fuel Administration issued an order vacating all rules, regulations, or orders governing licensees engaged in importing, manufacturing, distributing, or transporting oil or gas (May 19, p. 1). The Government reported by March 25, that there had been a substantial reduction in the coal output because of the "lack of demand" for coal (March 25, p. 8).

(8) Before the armistice there had been a great shortage of labor for production of war materials. Since the armistice the manufacture of this material has practically ceased, and unemployment has become acute. At the conference of Governors held December 16-18, (to quote from the statement of the Department of Labor), "an important feature [of the conference] was consideration of the problem of unemployment presented by demobilization of the forces, and by the sudden release of many thousands of industrial workers from essentially war industries" (Monthly Labor Review, March, pp. 53-54). The United States Labor Department in March referred to "the problem of unemployment now so acute" (*id.*), and it has officially reported that the estimated surplus of workers has "increased rapidly from 10,368 on November 30, 1918, to 358,890 on March 1, 1919" (*id.* pp. 145-146). The Department further reported that "there is an increase in unemployment for the current week, as well as a heavy increase in the area of unemployment" (Mar. 20, p. 5).

In addition to the plans formulated for government work, numerous conferences were held with a view to increasing the amount of non-war work in the country. A conference of Governors and Mayors was held for this purpose at the White House on March 3rd and 4th (March 3, p. 2); the War Department sent out a call urging the Draft Boards all over the country to assist in securing employment for the returning soldiers (Dec. 20, p. 1); the assistance of the churches was invoked and a special day set aside by the Presi-

dent to be known as "Employment Sunday" (April 28, p. 7), and the Government stimulated state and municipal public works in order to relieve unemployment (Nov. 21, p. 4; Mar. 20, p. 8).

The passing of the war necessity is further shown, both with respect to the unemployment situation and with respect to the demobilization of the Washington governmental departments engaged upon war work, by the report of the War Department of December 16th, to the effect that—

> "The thousands of civilian war workers in the Government service who will soon be dismissed because their services are no longer needed will be assisted in finding re-employment through plans now being arranged by the United States Civil Service Commission."

(9) The transportation situation also emphasizes that the war necessity has passed. On December 11, the Director General of railroads issued a statement in which he promised adequate railroad service for civilian needs by reason of "the war now being practically over," and the next day declared that "the war is ended" (Dec. 11, p. 4; Dec. 12, p. 6).

The shipbuilding program, which was at the heart of the country's war program, was cut down immediately after the armistice. From that day to April 25, the United States Shipping Board cancelled contracts for more than 2,000,000 tons of steel ships (May 5, p. 6). By the beginning of May, the United States Emergency Fleet Corporation was advertising the sale of scores of completed and partially completed ships and barge hulls (May 8, pp. 2-3).

The War Trade Board, in concurrence with the United States Shipping Board, stated on February 3, that the Government would immediately return the Dutch ships which had been taken over during the war and that *"this action is to be carried out because the war emergency and necessity under which the ships were taken over has passed"* (Feb. 3, p. 1). Similarly, the United States Railroad Administration stated on February 27, that *"following the signing of the armistice and the passing of the emergency war necessity,* it was decided that the maintenance of these lines [the coastwise steamship lines] under federal control was no longer necessary" (Feb. 27, p. 6).

In view of these official declarations there surely cannot be any reasonable doubt that there was in fact no war necessity or emergency on May 1, and none since then, which would warrant the sacrifice of private property and business without compensation, and the denial to individuals of the liberty to pursue their business.

We therefore respectfully submit:

1. That the writ of error should be dismissed for want of jurisdiction;

2. That the demurrer of the court below was properly sustained, for the reason that the information failed to state that the beer was an intoxicating liquor;

3. That the War prohibition legislation is no longer constitutionally effective.

THEODORE A. BELL,
*Attorney for Defendants in Error.*